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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and G. Ramanujam J.*

M/s. C.A. Galiakotwala and Co. (P.) Ltd., by its Managing Director .. *Appellant**
v.

M/s. Kandasamy Spinning Mills by Partner J.K.K. Munirajah .. *Respondent.*

(A) *Arbitration Act (X of 1940), section 34—Applicability—Suit for damages for alleged breach of contract—Notice given before suit calling for performance or to suffer damages—Existence of concluded contract denied and cancellation of contract put forward—Application for stay of suit and for direction to refer the matter to arbitration not maintainable.*

(B) *Partnership Act (IX of 1932)—Authority of partner in firm to submit to arbitration.*

People involved in commerce are expected like others, to know the dimensions as well as the limitations of the rights and responsibilities which spring from ordinary and normal trading relations. When a trader is confronted with a specific basic allegation that there is a contract as between himself and another, who claims the existence of such a contract and if that other person demands damages from him for breach of contract and for non-performance of the obligations arising thereunder, then the first reaction of that person should be either to accept the existence of the contract or to deny it; and if he accepts the existence of the contract, he should plead the circumstances under which he should be exonerated from performing his part of the contract. If, however, the other party demands from the person concerned performance of the contract under threat or pain of reconvey of damages for non-performance and the other person denies the existence of the contract and goes to the extent of saying that, even if there was any such contract it had been cancelled, then, it would not be open to that person once again to resurrect the situation and plead that there was such a contract and that contract contains a clause requiring disputes to be referred to arbitration and that therefore that clause to refer disputes to arbitration should prevail and no civil Court shall entertain such disputes which are to be adjudicated upon by arbitration as provided in the contract. [*Para.* 3.]

Held: As there was no written agreement to refer the matters in dispute to arbitration, and as there was a dispute about the existence of an agreement to refer the dispute to arbitration, and *a fortiori* on the ground that the appellant himself denied the existence of the parent contract, the application for referring the dispute to arbitration under section 34 of the Arbitration Act and for staying the trial of the suit is a misconceived one. [*Para.* 5.]

The implied authority of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration.
[*Para.* 6.]

Appeal against the order of the Court of the Principal Subordinate Judge, Erode, dated 6th August, 1977 and made in I.A. No. 874 of 1974 in O.S. No. 426 of 1974.

N. Varadarajan, for Appellant.

S. Gopalaratnam, for Respondent.

The Judgment of the Court was delivered by.

Ramaprasada Rao, CJ.—This appeal is by the unsuccessful defendant in I.A. No. 874 of 1974 in O.S. No. 426 of 1974, on the file of the Court of the Subordinate Judge of Erode. The respondent-plaintiff filed the suit for recovery of a sum of Rs. 1,63,794 as damages, on the foot that the appellant-defendent had committed breach of contract, dated 15th January, 1974, to supply 500 full-pressed bales of new crop 797 Dholka or Bavla FAQ cotton of 1973-1974 season on the terms and conditions contained in the confirmation slip dated 15th January, 1974. The contract originated in correspondence and the respondent's case is that it was concluded by a telegram. This is seen from Exhibits B-1 to B-3. The respondent's specific case is that he sent the sale con-

*A.A.O. No. 601 of 1977. *20th July,* 1978.

firmation letter to the appellant and that that was the process by which the contract was concluded. On the strength of such a concluded contract, the respondent-plaintiff was demanding the performance of the same in accordance with its tenor, which the appellant refused. Obviously the price of cotton which was the subject-matter of the contract, by then rose. The respondent had therefore to file the suit for the recovery of damages for breach of contract. He relied upon the correspondence ending with Exhibit B-3. The respondent, prior to the institution of the action, issued a notice Exhibit B- 16, calling upon the appellant to perform the contract or to suffer damages. Exhibit B-18 is the reply by the appellant in which he categorically denied that there was any concluded contract as between himself and the respondent, as according to him, the respondent had not returned the sale confirmation note duly signed by him in confirmation of the contract which originated in correspondence. In fact, the specific case of the appellant was that the contract had been cancelled by his letter, dated 1st February, 1974. It was in those circumstances the respondent had to file the suit for recovery of damages on the strength of the contract and the breach thereof. No sooner did the respondent file the suit, than the appellant took out under section 34 of the Arbitration Act an application for the stay of all proceedings in the suit and for directing the respondent to refer the alleged dispute in the suit to arbitration, in accordance with the rules and regulations of the East India Cotton Association Ltd., Bombay. The provocation for the appellant to file such an application was that under Exhibit B-3, which was the sale confirmation, reference is made to the East India Cotton Association Ltd., in the following terms:

> "We have pleasure to confirm having sold to you this day subject to the East India Cotton Association's Rules and Regulations as under:
>
> * * * * *
>
> Yours faithfully,
>
> *for* C.A. Galiakotwala and Co. (P.), Ltd.
> Sd. (defendant).

2. Taking advantage of the reliance placed by the respondent on Exhibit B-3, the appellant, notwithstanding his specific stand in Exhibit B- 18, raised a plea that the suit was not maintainable and that the dispute should be referred to arbitration in accordance with the contents of Exhibit B-3. This was negatived by the Court below on more than one ground. Firstly the learned Subordinate Judge thought that the respondent-plaintiff was not a member of the East India Cotton Association Ltd., and therefore he could not be compelled to submit himself to arbitration in accordance with the rules and regulations of that Association. Secondly he was of the view that, in case there was a dispute about the existence of an arbitration agreement, then in accordance with the by-laws of the Association there should be a written agreement between the contesting parties agreeing to refer the disputed matters to arbitration, and that in the absence of such a written agreement in the instant case the question of referring the subject-matter of dispute to arbitration did not arise. The third ground on which the learned Subordinate Judge refused to accept the application for reference to arbitration was that one partner could not bind the firm by his action in unilaterally consenting to refer the matter to arbitration. It is as against this ultimate decision of the Court below, the present appeal has been filed.

3. It is enough, for the purpose of this appeal, if we just highlight our attention on the specific stand taken by the appellant prior to coming to Court with the application under section 34 of the Arbitration Act. People involved in commerce are expected, like others, to know the dimensions as well as the limitations of the rights and responsibilities which spring from ordinary and normal trading relations. When a trader is confronted with a specific basic allegation that there is a contract as between himself and another, who claims the existence of such a contract and if that other person demands damages from him for breach of contract and for non-performance of the obligations arising thereunder, then the first reaction of that person should be either to accept the existence of the contract, or deny it; and, if he accepts the existence of the contract, he should plead the circumstances under which he should be exonerated from performing his part of the contract. If, on the other hand, in a situation like the one illustrated above, the other party demands from the person concerned performance of the contract under threat or pain of recovery of damages for non-performance of the same, and the other person denies the existence of the contract and goes to the extent of saying that, even if there was any such contract, it had been cancelled, then it would not be open to that person once again to resurrect the situation and plead that

there was such a contract and that contract contains a clause requiring disputes to be referred to arbitration, and that therefore that clause to refer disputes to arbitration should prevail and no civil Court shall entertain such disputes which are to be adjudicated upon by arbitration as provided in the contract. In the instant case Exhibit B-18 is a complete answer to the application for reference of the disputes to arbitration. In Exhibit B-18 the appellant took up the specific stand that there was no concluded contract at all as between himself and the respondent and that, in any event, the so-called contract had been cancelled by his letter, dated 1st February, 1974. This was at a time when the respondent was threatening to come to Court with a suit for damages on the foot of the breach of the contract. After the filing of the threatened suit it was not open to the appellant to give a volte-face to his specific stand that there was no concluded contract as between himself and the respondent, and plead that there was such a contract and on the top of it ask for a stay of the suit on the ground that there existed, even at the time when he sought for stay of the trial of the suit under section 34 of the Arbitration Act, an arbitration agreement which was in force in the eye of law. A person cannot be permitted to approbate and reprobate. Once he has denied the contract, he cannot soon thereafter, when he is placed in an inconvenient position, give the go-by to his earlier stand and contend that there is a contract and that that contract includes the arbitration agreement as well. The question is whether in the above circumstances the appellant can seek for relief under section 34 of the Arbitration Act.

4. Even assuming that there is some *bona fides* in the attitude of the appellant, the answer is provided in clause 38 of the by-laws of the East India Cotton Association Ltd., which prevents a person like the appellant from seeking the assistance of the Court for referring the subject-matter of dispute to arbitration. Clause 38, so far as relevant, provides as follows:—

> 38-A. All unpaid claims whether admitted or not, and all disputes and differences (other than those relating to quality) arising out of or in relation to—
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> (*a*) cotton transactions between members including any dispute as to the existence of such transactions; or
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> (*b*) cotton contracts (whether forward or ready, and whether between members or between a member and a non-member) made subject to these by-laws or subject to East India Cotton Association arbitration or containing words or abbrevations to a similar effect, including any dispute as to the existence of such transaction, provided in the latter case the parties had agreed in writing before entering into business relation that any dispute arising between them out of that agreement or any such transactions that may be entered into including any dispute as to the existence of such transaction, shall be referred to arbitration under the by-laws of the Association."

5. It is seen from clause (*b*) above that, if there is a dispute as to the existence of a contract or transaction. then it is imperative that the parties who claim that matters should be arbitrated and not adjudicated upon by civil Court should produce an agreement in writing that such an agreement was entered into before entering into business relations and that that agreement was for the purpose of referring any dispute arising between them out of that agreement or any such transaction to arbitration under the by-laws of the Association. The primordial condition, therefore, which would enable a person like the appellant to seek for the assistance of the Court for stay of the trial of the suit under section 34 of the Arbitration Act is the existence of an agreement in writing which would compel the parties to refer the matters in dispute to arbitration. The plea originally was that there was admittedly no such contract in writing. Even otherwise, we have already referred to Exhibit B-18 wherein the appellant has categorically stated that there was no contract at all even in the matter of the supply of the goods as was sought to be made out by the respondent. In these circumstances, it is idle for the appellant to completely give a new look and a new phase to his stand which is hopelessly inconsistent with his earlier definite attitude which disclosed his mind whereby he denied the existence of the contract. He cannot, therefore, be allowed at a later convenient stage, in order to subserve his own purpose, to plead that there was such a contract and that the dispute should be referred to arbitration. On the ground that there was no written agreement to refer the matters in dispute to arbitration, and as there is a dispute about the existence of an agreement to refer the dispute to arbitration, and *a fortiori* on the ground that the appellant himself denied the existence of the parent contract, the application for referring the dispute to arbitration under section 34 of the Arbitration Act and

for staying the trial of the suit is a misconceived one and has therefore been rightly dismissed by the Court below.

6. It is unnecessary for us to go into the other two questions. Even otherwise, we agree with the Court below that the implied authority of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration. In the instant case one of the partners of the respondent firm alone has signed Exhibit B-3 and there is no proof that he had otherwise power to commit the firm to arbitration by his sole participation. We therefore agree with the Court below that the appellant has no right to interdict the ordinary process of law and the trial of the suit instituted by the respondent in the lower Court. His application under section 34 of the Arbitration Act has therefore been rightly dismissed.

7. In the above circumstances, the appeal fails and is dismissed with costs. Counsel's fee, Rs. 500.

8. The appellant-defendant is granted ten weeks' time for filing written statement.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT:—*V. Ramaswami, J.*

Dr. Balaguru ... *Petitioner**

v.

The Government of Tamil Nadu represented by the Commissioner and Secretary to Government Agricultural Department, Fort St. George, Madras-600009 and another ... *Respondents.*

Tamil Nadu Civil Services (Classification, Control and Appeal) Rules, Rule 17 (e)—*Serious allegations against Government Servant—Detailed enquiry contemplated — Government servant placed under suspension —Suspension validly made*—Certiorari *refused—Constitution of India* (1950), *Article* 226.

The petitioner was an official under the Tamil Nadu State Government and was placed under suspension pending contemplated detailed enquiry into grave charges. The petitioner challenged the order of suspension in writ proceedings under Article 226 of the Constitution.

Held: Rule 17 (*e*) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules itself was clear enough to show that when an enquiry into grave charges was contemplated, the power of suspension could be invoked. When once the power was vested in the Government, since suspension pending enquiry itself could not be considered to be a punishment, the High Court could not interfere with the order of suspension exercising jurisdiction under Article 226 of the Constitution of India.

[*Paras.* 2 *and* 3.]

Case referred to:

P. R. Nayak v. *Union of India*, (1972) 2 S.C.J. 1: A.I.R. 1972 S.C. 554.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to G.O. Ms. No. 1087, Agricultural Department, dated 22nd June, 1978, and quash the order of suspension issued in G.O. Ms. No. 1087 aforesaid against the petitioner as illegal and without jurisdiction.

R. G. Rajan, for Petitioner.

N. R. Chandran, for the Government Pleader, on behalf of Respondents.

The Court made the following

ORDER.—In response to the notice of motion issued to the Government, a note and the file concerning G.O. Nos. 1087 and 1088, dated 22nd June, 1978, are produced by the Government Pleader. This file and the note show that a petition containing certain allegations against the petitioner herein was received by the Director of Animal Husbandry. But the Director forwarded the petition to the Government with a request to entrust the matter to some other senior high-level officer of the Government for enquiry on the ground that the petitioner had been disputing the *bona fides* of the Director on earlier occasions and therefore he did not want to deal with that matter. On receipt of the petition, the Government forwarded the matter to the Director of Vigilance and Anti-corruption for

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*W. P. No. 2976 of 1978. 17*th August*, 1978.

a discrect enquiry and report. On receipt of the report of the Director of Vigilance and Anti-corruption in which the Director has suggested that a detailed enquiry is called for, the concurrence of the Vigilance Commissioner was sought for and obtained. The Vigilance Commissioner also appears to have stated that since the allegations levelled against the petitioner are serious enough, the Government could consider the question of suspending the officer pending a detailed enquiry. First the Government is stated to have considered the question of transferring the official to a different station. But ultimately, the Government came to the conclusion that since an enquiry into grave charges is contemplated, the officer had to be placed under suspension and accordingly by the impugned order, the petitioner was placed under suspension pending enquiry into the grave charges contemplated.

2. The learned counsel for the petitioner strenuously contended that there is no inherent power of suspension as such and the power of suspension could be traced only to rule 17 (*e*) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules and that rule so far as it is relevant, reads as follows:

> "17 (*e*) (1). A member of a service may be placed under suspension from service, where (*i*) an enquiry into grave charges against him is contemplated, or is pending."

According to the learned counsel unless a definite charge which is considered to be very grave is communicated to the petitioner, the power of suspension could not be invoked. The learned counsel pointed out that the word "charges" itself shows that there is a definiteness of the charge against him and that charge should have been communicated. It is true that the words "an enquiry into grave charges" qualifies both the words "is contemplated" and "is pending" thereby suggesting that the word "charges" has a definite meaning in that place, because if an enquiry into grave charges is said to be pending, it would only mean that the charges had already been communicated to the petitioner. The same meaning is sought to be given even in the case of an enquiry that is contemplated. Having given my serious consideration, I am of the view that this interpretation of the rule is not acceptable. If a charge memo. had to be served on the officer before the power of suspension is invoked, then the enquiry itself would have been initiated and it would be pending. Therefore we will not be giving any meaning to the words "is contemplated", if the charge memo. is to be served on the officer. The rule itself, though is not happily worded, is clear enough to show that when an enquiry into grave charges is contemplated, the power of suspension could be invoked. In this case, as already stated, the petition received was forwarded to the Director of Vigilance and Anti-Corruption and after an enquiry, he submitted his report that a detailed enquiry is called for and for initiating a detailed enquiry, the concurrence of the Vigilance Commissioner was also obtained. In those circumstances, an enquiry into grave charges against the petitioner can be said to be in contemplation of the Government enabling the Government to suspend the officer pending such contemplated enquiry.

3. The decision of the Supreme Court in *P. R. Nayak* v. *Union of India*[1] relied on by the learned counsel for the petitioner dealt with the power of suspension under rule 3 of the All India Services (Discipline and Appeal) Rules, 1969. The wording, in that rule is clearly different from those in rule 17 (*e*) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules. Rule 3 (1) of the All India Services (Discipline and Appeal) Rules, 1969, in so far as it is relevant is as follows:

> "3. *Suspension during disciplinary proceedings* —(1) 'If, having regard to the nature of the charges and the circumstances in any case, the Government which initiates any disciplinary proceedings is satisfied that it is necessary or desirable to place under suspension a member of the Service against whom such proceedings are started, that Government may
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> (*a*) If the member of the service is serving under it, pass an order placing him under suspension, or
>
> (*b*) if the member of the Service is serving under another Government request that Government to place him under suspension, pending the conclusion of the inquiry and the passing of the final order in the case."

The later portion of the rule shows that the Government could place the officer under suspension "pending the conclusion of the inquiry and the passing of the final order in the case". Even in the beginning of the rule, it is mentioned as 'having regard to the nature

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1. (1972) 2 S.C.J. 1. A.I.R. 1972 S.C. 554.

of the charges". It is in these circumstances and having regard to sub-rules (3), (4), (5), (6) and (7), the Supreme Court held that the rule does not contemplate or suggest that suspension can be ordered merely when disciplinary proceedings is contemplated. The decision therefore is of no application to the interpretation of Rule 17 (e) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules where it is provided specifically that an officer may be placed under suspension where an enquiry is contemplated or is pending. In fact, in the decision cited *supra*, the Supreme Court has pointed out the difference in language in rule 12 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, where we find a provision for suspension of the Government servant concerned when, *inter alia*, "a disciplinary proceeding against him is contemplated or is pending" and the language used in rule 3 of the All India Services (Discipline and Appeal) Rules, 1969, and observed as follows:

> "In our view, the difference in the language used in the relevant rules dealing with suspension in the two sets of rules, namely, Central Civil Services (Classification, Control and Appeal) Rules and All India Services (Discipline and Appeal) Rules may not be considered to be wholly irrelevant and unhelpful for discovering the intention of the draftsman in adopting different phraseology while dealing with the same subject of suspension of Government servants of different categories".

When once the power is vested in the Government, since suspension pending enquiry itself cannot be considered to be a punishment, this Court cannot interfere with the order of suspension exercising jurisdiction under Article 226 of the Constitution of India. The writ petition therefore fails and the same is dismissed. These will be no order as to costs.

4. It is made clear that none of the observations made in this order shall prejudice the petitioner in the enquiry pending against him.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Ramaprasada Rao, CJ.*

M. Kunjithapatham and others .. *Petitioners**

v.

The Thiruvilaiyattam Village Co-operative Agricultural Credit Society ZB-95 by its Secretary, Thiruvilaiyattam and another ... *Respondents.*

Tamil Nadu Co-operative Societies Act (LIII of 1961), sections 71 and 73—Co-operative Society—Proceedings initiated against the Secretary under section 73—Award passed —Subsequent surcharge proceedings under section 71 in respect of the same subject-matter not competent.

If there has been an invocation of one of two or more remedies available in law, such an invocation results in a decision rendered by the appropriate statutory authority; then a resurrection of the very same subject-matter through another available remedy contemplated in the very same enactment would lead to a violation of the principles of natural justice as well as the accepted canons of common law. If one provision of the Tamil Nadu Co-operative Societies Act is taken advantage of by the society for securing its rights, and if such a reference to the Registrar, as in this case, under section 73, has resulted in an award, it cannot be thrown overboard and by-passed by invoking once again the provisions of section 71, as if fresh surcharge proceedings could be initiated by the society which is armed with an award which is executable in the eye of law. [*Para.* 3.]

Where the directors had taken prompt action under section 73 against the miscreant and against the Secretary who was in charge of the accounts and brought him to book and secured an award from the statutory authority, the Registrar, they cannot still be said to be guilty of wilful negligence nor can they be characterised as persons who misappropriated the funds of the society.

[*Para.* 3.]

Petition under Article 227 of the Constitution of India praying the High Court to revise the order of the Co-operative Tribunal (District

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C.R.P. No. 3549 of 1974. 11*th August*, 1978.

Judge), East Thanjavur at Nagapattinam, dated 19th August, 1974, and made in C.M.A. No. 11 of 1974 (Surcharge Case No. 13379/69-G, Deputy Registrar of Co-operative Societies, Mayuram).

K. Alagiriswami, for Petitioners.

R.G. Rajan, for Respondent.

The Court made the following

ORDER.—The interesting question raised in this civil revision petition is whether the proceedings initiated against the petitioners, amongst others, under section 71 of the Tamil Nadu Co-operative Societies Act, is maintainable at all, in view of certain factors and events which preceded the filing of what are usually called surcharge proceedings under section 71 of the Act. It appears that the petitioners, who were ex-officers of Thiruvilaiyattam Village Co-operative Agricultural Credit Society, found, on an audit report, there was misappropriation and wilful negligence on the part of the Secretary of the Society, one Deenadayalu Naidu. Based on such audit report, proceedings were initiated by the petitioners as Board of Directors under section 73 of the Act. It is not in dispute that such proceedings were initiated under section 73 of the Act at the instance of the petitioners herein as against the said Deenadayalu Naidu, and the Registrar of Co-operative Societies, on receipt of such a reference, decided the dispute and held that the said Deenadayalu Naidu was liable to account to the society in large sums of money and gave an award accordingly. I am not setting out in detail the merits, as the question raised before me is purely a legal one. After the award was passed by the Registrar under section 73, the Deputy Registrar, apparently as the person authorised by the Registrar within the meaning of section 71 of the Act, on his own motion, initiated fresh proceedings under section 71 of the Act and impleaded the petitioners as well as Deenadayalu Naidu and called upon them to explain why they should not be directed to repay the moneys or property alleged to have been misappropriated by them or fraudulently retained by them or by reason of the loss sustained by the society on account of such branch of trust or wilful negligence on their part. The Co-operative Tribunal, to whom the matter went up in appeal, found that the petitioners as well as Deenadayalu Naidu were guilty of breach of trust and held that the petitioners, who were the Board of Directors of the Society, were liable to make good the deficiency and pay the requisite compensation as quantified by the Deputy Registrar, and accordingly dismissed the appeal which came before it against the order of the Deputy Registrar. The present civil revision petition is filed under Article 227 of the Constitution of India.

2. The main legal contention of Mr. Alagiriswamy, learned counsel for the revision petitioner, is that, as proceedings under section 73 have already been initiated by the Board of the Society and as the Registrar of Co-operative Societies on such a reference has decided the dispute and found that Deenadayalu Naidu is the person who should make good the loss sustained by the society during the period when the petitioners were in charge of the affairs of the society, there cannot be a resurrection of the matter once again under section 71 of the Act, as if the fresh surcharge proceedings can again be laid against the petitioners on the ground that the award passed by the Registrar under section 73 of the Act could not realise any money at all or that Deenadayalu Naidu could not make good the loss sustained by the society due to his acts of misfeasance or wilful negligence. Mr. R. G. Rajan, learned counsel for the respondent-society, would contend that, though sections 71 and 73 are independent provisions and act in their own respective fields, any proceedings or the resultant decision rendered under section 73 by the appropriate statutory authority cannot be a bar to an independent proceeding by the society under section 71 of the Act, as against, those who are responsible for the loss sustained by the society. It is in this context that the question of law has arisen.

3. Section 73 of the Act enables the society to approach the Registrar and seek for a decision on such reference. Such a reference may touch upon any matter connected with the management of the business of the society. It is not in dispute before me that the petitioners, as members who constituted the quandom Board of the Society, did make such a reference to the Registrar and called upon him to decide the dispute which had by then arisen by which the Board accused Deenadayalu Naidu, the then Secretary of the society, as the sole person who wilfully neglected the management or administration of the society. They also alleged that Deenadayalu Naidu misappropriated the funds of the society. It was in such an express context that the

Registrar, who is the statutory named authority under section 73 of the Act, decided such a dispute and passed an award to the effect that it was Deenadayalu Naidu who should make good the loss, which had resulted from the acts of misconduct, misfeasance, etc., on his part as an officer of the society. After securing such an award apparently attempts were made by the society to recover the quantified amount under the said award, but with no success. Thereafter the society, represented by its present Secretary and the present board, initiated fresh proceedings under section 71, styling it as surcharge proceedings, and impleaded in those proceedings the petitioners herein, as also Deenadayalu Naidu, claiming that deficiency had been caused in the assets of the society by breach of trust or wilful negligence on the part of the petitioners and Deenadayalu Naidu and that therefore they should make good the loss sustained by the society. Before the Deputy Registrar and the Co-operative Tribunal the present legal contention, though raised, was not adverted to. The only question for consideration therefore is whether the surcharge proceedings initiated by the society under section 71 of the Act, ignoring and setting at naught the statutory award passed by the Registrar under section 73 over the same subject-matter, can be sustained. I refer to it as "the same subject-matter, in the sense that it is common ground that the loss claimed by the society as against Deenadayalu Naidu which was the subject-matter of the decision under section 73, is the same as that claimed in the surcharge proceedings also. It is in this sense that there is similarity in the subject-matter. This not disputed before me. One other peculiar feature is that, the audit report rendered, which touched upon and highlighted the loss sustained by the society, which was later traced to certain acts of misconduct of the quandom officers, was the basis for both the proceedings under section 73 as well as under section 71 of the Act. If therefore the same audit report propelled the officers of the society to approach the Registrar for a decision on the question as to who should be mulcted with the responsibility for the loss which accrued to the society, then it appears to me to be unreasonable once again to initiate proceedings under cover of the same subject-matter, but under section 71 of the Act. There is an exhaustion of the power of the society or its officers when they invited a decision from the Registrar under section 73 and when it resulted in an award being passed by the Registrar under the above section. It is that award which is equatable to a decree of a competent Court that can be executed by the society thereafter for realisation of moneys due and payable by the misconducting officials as per the award rendered by the Registrar. It would be a travesty of procedure, if the Board, which came into the picture after the previous Board had to quit because of the earlier events which had happened and which had caused loss to the society, could seek to circumvent the executable award available to the society and seek umbrage under section 71 of the Act, merely because it is an independent provision under the same enactment. It is not strange for an enactment to contain two or more remedies for the assertion of a common or single right. But unless otherwise provided for in the statute, if one such available remedy is exhausted, then in my view, the invocation of the other remedy, which is provided for as an ancillary to the first remedy already exhausted, cannot be sought for, for that would mean that the authorities in power can at their convenience and pleasure invoke one provision after another in a particular statute for purposes of availing of the remedies at different times. This would not be conducive to an orderly application and understanding of the laws. In my view, therefore, if there has been an invocation of one of two or more remedies available in law, such an invocation results in a decision rendered by the appropriate statutory authority, then a resurrection of the very same subject-matter through another available remedy contemplated in the very same enactment would lead to a violation of the principles of natural justice as well as the accepted canons of common law. In this view, though Mr. Rajan is right in his submission that sections 73 and 71 act independently in their respective fields, yet if one provision is taken advantage of by the Society for securing its rights, and if such a reference to the Registrar, as in this case, under section 73, has resulted in an award, it cannot be thrown overboard and bypassed by invoking once again the provisions of section 71, as if fresh surcharge proceedings could be initiated by the society which is armed with an award which is executable in the eye of law. In the peculiar circumstances of the case, I am of the view that the award passed by the Registrar under section 73 when the petitioners herein took prompt action under section 73 of the Act against the miscreant and against the Secretary who was in charge of such amounts an brought him to book and secured an award from the statutory autho-

rity, namely, the Registrar, under section 73, they cannot still be said to be guilty of wilful negligence nor can they be characterised as persons who misappropriated the funds of the society. Even on merits therefore there is no justification for the institution of fresh action against the petitioners.

4. The civil revision petition is accordingly allowed. There will be no order as to costs.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and M.A. Sathar Sayeed, JJ.*

The United India Fire and General Insurance Company, Limited (Unit), The Madras Motor and General Insurance Company Limited, Madras .. *Appellants**

v.

Parvathy and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), *sections* 96 *and* 110-*C—Applicability—Lorry dashing against man standing at a bus stop—Death of the man—Petition by wife for compensation—Appeal by insurance company against compensation awarded—Defences open to the insured whether open to the insurer.*

A conjoint reading of sections 96 (2) and 110-C (2-A) of the Motor Vehicles Act shows that it is only when there is collusion between the person making the claim and the person against whom the claim is made, or the person against whom the claim is made has failed to contest the claim, the insurance company is enabled to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made, and not in every case where the insurance company has been impleaded. [*Para.* 8.]

In this case, section 110-C (2-A) cannot apply as the insured resisted the claim before the Tribunal but has not chosen to file an appeal. The mere fact that the insured has not filed an appeal does not mean that there is collusion between him and the claimant. The insured has not remained *ex parte* before the Tribunal and therefore, he cannot be said to have abandoned the defence. Similarly, it is not shown that the insurance policy contains a clause enabling the insurer to raise all defences that are open to the insured in the proceeding under the policy. Even assuming that there is such an enabling provision in the policy still the insurer can himself raise all contentions that are open to the insured only if he defends the action in the name of the insured. In this appeal, the insured is not shown as a co-appellant along with the insurance company which is the appellant. [*Para.* 11.]

The fact that an appeal by the insurance company is maintainable under section 110-D of the Act will not mean that the insurance company can raise all contentions that are open to the insured. The statutory limitations contained in section 96 (2) will still apply and it cannot be said that those limitations will govern only the proceedings before the Tribunal, at the initial stages and not the Court at the appellate stage. The limitations contained in section 96 (2) will equally apply to the appeal filed by the insurance company. Since the insurance company has not filed the appeal in the name of the insured and as there is no collusion proved between the insured and the claimant, the defences that are open to it under section 92 (2) can alone be canvassed in the appeal. [*Para.* 12.]

Cases referred to:—

British India General Insurance Company v. *Itbar Singh,* 1960 S.C.J. 44: (1960) 1 S.C.R. 168: (1960) 1 An. W.R. (S.C.) 6: (1960) 1 M.L.J. (S.C.) 6: A.I.R. 1959 S.C. 1331; *Ayesha Bagum* v. *G. Veerappan,* (1966) A.C.J. 101; *Joginder Nath* v. *Shanti Devi,* (1967) A.C.J. 150; *Abdul Kadar* v. *Kashinath,* A.I.R. 1968 Bom. 267; *General Insurance Company Ltd.* v. *Jagadeeswari,* (1974) A.C.J. 234; *Northern India General Insurance Company Ltd.* v. *L. Krishnan,* (1972) A.C.J. 420; *Ramesh Chandra* v. *Randhir Singh,* A.I.R. 1977 All. 330.

Appeal against the order of the Court of the Principal Subordinate Judge (Motor Accidents Claims Tribunal), Tiruchirapalli dated 17th December, 1974 and made in M.A.C. TOL No. 61 of 1972; and

C.M.P. No. 3963 *of* 1978.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to permit the petitioner to prosecute the appeal by raising all contentions including the question

* A.A.O. No. 534 of 1975 and C.M.P.No. 3963 of 1978. *27th April,* 1978.

of quantum and other matters, in the above said A.A.O. No. 634 of 1975.

K.S. Narasimhan, for Appellant.

V. Sridevan, *G.Masilamani* and *R. Balachander*, for Respondents.

The judgment of the Court was delivered by

Ramanujam, *J.*—This appeal has been filed by an Insurance Company against the order of the Motor Accidents Claims Tribunal awarding a sum of Rs. 20,000 as compensation to the first respondent herein in respect of an accident resulting in the death of the first respondent's husband, one Subramaniam, that took place on 13th June, 1971, when he was hit by a lorry owned by the second respondent and driven by one Vellayan.

2. The first respondent, who is the wife of the deceased Subramaniam, filed an application claiming a compensation of Rs. 20,000 before the Motor Accidents Claims Tribunal under section 100-A of the Motor Vehicles Act in respect of the accident that took place at 6.00 A.M. on 13th June, 1971, on the ground that the lorry, belonging to the second respondent and driven by its driver in a careless and negligent manner, hit the deceased who was standing near the bus stop, resulting in the death of the deceased on the spot and that as a result of the death, the petitioner had lost her husband and also incurred monetary loss. It is her case that the deceased was earning a minimum of Rs. 12 per day as an artificial diamond worker and that source of income has been entirely lost to her. The said application for compensation was resisted by the second respondent the owner of the lorry and the appellant, the insurer. The first respondent, owner of the lorry, raised the following contentions: The deceased used to get fits. The deceased while crossing the road got fits and fell down on the right rear wheel of the vehicle. The accident was not due to the rash and negligent driving by the driver of the lorry. The insurer raised the following contentions. The accident occurred solely due to the negligence of the deceased who darted across the road and fell on the right rear wheel of the vehicle. The accident was not due to the negligent driving of the lorry by the driver. It also denied the age, earning capacity, etc. of the deceased and said that the compensation claimed was excessive.

3. After analysing the evidence adduced by the parties, the Tribunal took the view that the accident was entirely due to the rash and negligent driving of the lorry by R.W. 1 and that there is no evidence to show that the deceased used to get fits often that while crossing the road in a careless manner, he suddenly swooned and fell under the right rear wheel of the lorry, that the sketch Exhibit A-6 prepared by P.W. 4, the Inspector of Police within whose jurisdiction the place of occurrence is situate, showed that the dead-body was lying 85 feet north of the place where the lorry came to a halt after the impact, that it showed R.W. 1, the lorry driver, should have driven the lorry on the wrong side of the road instead of keeping to the left, and that from this it was clear that he was driving the lorry in a rash and negligent manner when he hit and caused the death of the deceased. The Tribunal has also relied on the evidence of P.W. 2, the eye-witness, who says that the deceased and one Jagannathan were waiting for the bus on the eastern side to go to Trichy and as there was no room in the bus, they crossed and came to the mud portion of the road with a view to take tea in his tea-shop, that while were they walking in the mud portion towards his tea-shop, the lorry came from north at a high speed in the wrong side and its front bumper hit Subramaniam and threw him away, that Subramaniam fell on the road facing down and the front right wheel run over his legs, that the lorry came to a stop after running a distance of 50 feet from the deceased and that the deceased died on the spot. P.W. 2 has also been earlier examined by the criminal Court.

4. As regards the quantum of compensation, the Tribunal found that the petitioner is a young girl aged 19 years and the deceased was aged 23 years at the time of his death, that the deceased would have lived for another 40 years if he had not met with the accident, that the deceased was hale and healthy at the time of his death, that as per the evidence of P.W. 3 in whose shop the deceased was workiug he was getting a daily wage of Rs. 7 to Rs. 12 and that he was a permanent employee in P.W. 3's shop. On that basis, the Tribunal held that the deceased would have earned daily a sum of Rs. 7 and would have worked for 20 days in a month. On that basis, a sum of Rs. 140 was fixed as his earnings per month, and after giving allowances for his own expenses his contribution to the family was determined at Rs. 70 per month and the annual dependency at Rs. 840. Multiplying the sum by 40, as the deceased would have lived for a period of 40 years, the amount was arrived at Rs. 33,600,

but as the claimant had restricted her claim for Rs. 20,000 the Tribunal granted a sum of Rs. 20,000 as compensation. The owner of the lorry has not filed an appeal and the insurance company has alone filed this appeal challenging the said award of compensation.

5. In this appeal, the findings of the Tribunal that the accident was due to rash and negligent driving of the lorry by its driver and that the claimant is entitled to a sum of Rs. 20,000 as compensation, have both been questioned.

6. After going through the evidence of P.W. 2 the eye-witness and R.W. 1, the driver of the lorry, we are satisfied that the Tribunal is justified in its conclusion that the accident was due to rash and negligent driving of the lorry. Exhibit P-6, sketch prepared by the Inspector of Police immediately after the accident, shows the position of the lorry when it came to a halt with reference to the place of impact. Exhibit P-6 shows that the lorry came to a halt after running to a distance of 85 feet. That shows that the lorry was coming at a fairly high speed. Further, the sketch shows that the impact was on the mud portion on the right side of the road, which indicates that the lorry was driven on the wrong side and that the driver did not keep the vehicle to the left side of the road. Therefore, there are enough materials to support the finding of the Tribunal that the accident was due to rash and negligent driving of the lorry by its driver and that it was not due to the deceased's fault in crossing the road carelessly and swooning and falling down on the right rear wheel of the vehicle as spoken to by the lorry driver.

7. On the question of compensation, the learned counsel for the appellant would, however, say that in any event the compensation awarded is excessive. The learned counsel for the first respondent had raised a legal plea that the Insurance Company cannot question the quantum of compensation that the defences open to an insurance company in a claim for compensation under section 110-A of the Motor Vehicles Act are very limited, and that its objection cannot extend to the quantum of compensation. The learned counsel for the appellant contends that all defences that are open to the insured are also open to the insurer, as the ultimate liability for compensation has to be met only by the insurer under the terms of the insurance policy.

8. Before we proceed to consider the tenability of the relative contentions, we may note the relevant statutory provisions. Section 96 (1) of the Motor Vehicles Act says that if judgment in respect of any liability under a certificate of insurance under section 95 (4) is obtained against any person insured by the policy, the insurer shall, subject to the provisions of that section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor in respect of the liability. Sub-section (2) to section 96, however, says that no sum shall be payable under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice of the proceedings through the Court and the insurer to whom notice of the proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the grounds set out in clauses (*a*), (*b*) and (*c*) thereunder. Section 96 (2), therefore, indicates that the defences that are normally open to an insurer as against the claim of a third party in respect of the policy issued by it can be only on certain stated grounds. Section 110-C (2-A) dealing with the procedure and powers of the Tribunal says that where in the course of any enquiry, the Tribunal is satisfied that there is collusion between the person making the claim and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim, the Tribunal may direct the insurer to be impleaded as a party to the proceedings and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of grounds that are available to the person against whom the claim has been made. A conjoint reading of both the sections 96 (2) and 110-C (2-A) indicates that it is only when there is collusion between the person making the claim and the person against whom the claim is made, or the person against whom the claim is made has failed to contest the claim, the insurance company is enabled to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made, and not in every case where the insurance company has been impleaded.

9. The above provisions of the Motor Vehicles Act have come up for consideration in a series of decisions. In *British India General Insurance Company* v. *Itbar Singh*[1], it has been held

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1. 1960 S.C.J. 44 : (1960) 1 S.C.R. 168: (1960) An. W.R. (S.C.) 6: (1960) 1 M.L.J. (S.C.) 6: A.I.R. 1959 S.C. 1331.

that the insurer can take only those defences which are open to him under sub-section (2) of section 96 of the Motor Vehicles Act, 1939, and that apart from the extent indicated by the statute, an insurer has no right to be made a party to the proceedings initiated by the injured against the insured causing the injury. However, it has been held in that case that the insurer has the right to defend the action on all grounds that are open to the insured, provided he has reserved that right by the terms of the policy and defends the action in the name of the assured. An *Ayesha Begum* v. *G. Veerappan*[1], this Court has observed that the insurance company could not question the quantum of compensation in appeal on the principles laid down in *British India General Insurance Company* v. *Itbar singh*[2]. In *Joginder Nath* v. *Shanti Devi*[3], it has been held that the insurance company was not entitled to appeal against the quantum of compensation in view of the clear terms of section 96 (2), and that an appeal against the order of the Tribunal by the insurance company which he could not contest before the Motor Accidents Tribunal, was not competent. In *Abdul Kadar* v. *Kashinath*[4], a Division Bench held that section 96 of the Motor Vehicles Act, makes it clear that in the application for damages under the Motor Vehicles Act an insurance company need not be made a party by the claimant, but under sub-section (2), it is the duty of the Court to issue a notice of the proceedings to the insurance company and on such notice being issued, the insurer in entitled to be made a party and defend the action only on the ground that the policy stood cancelled on the grounds stated in the sub-section, and that it is only on those limited grounds that the insurer is entitled to contest the proceedings. In *Madras Motor and General Insurance Company Ltd.* v. *Jagadeeswari*[5], a Division Bench of this Court had expressed the view that the defences that are open to the insurance company are only those which are specified under section 96 (2) of the Motor Vehicles Act and that however if the insurance policy provides for a reservation of the right to the insurance company to defend and raise all defences that are open to the insured, the insurance company can by itself raise those defences. In *Northern India Genrael Insurance Company Ltd.* v. *L. Krishnan*[1], a bench of the Mysore High Court has held that the insurer can urge all the defences open to the insured in the name of the insured as per the terms of the policy, if there is reservation to that effect in the policy or if the conditions set out in section 110-C (2-A) are satisfied. In *Ramesh Chandra* v. *Randir Singh*[2], an appeal had been filed by the insurer against the award of the claims Tribunal questioning only the quantum of compensation. The question that arose in that appeal was as to what are the defences that are open to the insurance company. It was held that it is not open to the insurance company to assail the findings of the Tribunal on merits, and that the grounds that can be raised in the appeal by the insurance company can only be those set out in clauses (*a*) to (*c*) of sub-section (2) of section 96.

1. 1966 A.C.J. 101 (Mad.).
2. 1960 S.C.J. 44: (1960) 1 S.C.R. 168: (1960) 1 An.W.R. (S.C.) 6: (1960) 1 M.L.J. (S.C.) 6: A.I.R. 1959 S.C. 1331.
3. 1967 A.C.J. 150 (Punj.).
4. A.I.R. 1968 Bom. 267.
5. 1974 A.C.J. 234.

10. The decisions referred to above seem to lay down the following two exceptions to the limitation contained in the provisions of section 96 (2) as to the nature of the defences that are open to the insurer in a claim under section 110-A. One exception is that contained in section 110-C (2-A) where is a collusion between the claimant and the insured or where the insured has not chosen to defend the proceedings. The second exception is where the insurance policy itself enables the insurer to defend the action in the name of the insured in respect of the claims arising under the policy.

11. In this case, section 110-C (2-A) cannot apply as the insured resisted the claim before the Tribunal, but has not chosen to file the appeal. The mere fact that the insured has not filed an appeal does not mean that there is collusion between him and the claimant. The insured has not remained *ex parte* before the Tribunal and therefore, he cannot be said to have abandoned the defence. Similarly, it is not shown that the insurance policy contains a clause enabling the insurer to raise all defences that are open to the insured in the proceedings under the policy. Even assuming that there is such an enabling provision in the policy, still the insurer can himself raise all contentions that are open to the insured only if he defends the action in the name of the insured. In this appeal, the insured is shown

1. (1972) A.C.J. 420.
2. A.I.R. 1977 All. 330.

as one of the respondents and he is not shown as a co-appellant along with the insurance company which is the appellant. Therefore, both the exceptions cannot come into play in this case.

12. The learned counsel for the appellant would, however, submit that the limitation contained in section 96 (2) as to the defences that are open to the insurance company will apply only to the proceedings before the Tribunal and not before the appellate Court and that once an appeal is filed under section 110-D of the Motor Vehicles Act, the insurance company is entitled to question the award on all grounds that can be raised by the insured. We are unable to accept this contention of the learned counsel. The fact that an appeal by the insurance company is maintainable under section 110-D of the Act will not mean that the insurance company can raise all contentions that are open to the insured. The statutory limitations contained in section 96 (2) will still apply and it cannot be said that those limitations will govern only the proceedings before the Tribunal, at the initial stages and not the Court at the appellate stage. In our view, the limitations contained in section 96 (2) will equally apply to the appeal filed by the insurance company. Since the insurance company has not filed the appeal in the name of the insured and as there is no collusion proved between the insured and the claimant, the defences that are open to it under section 96 (2) can alone be canvassed in the appeal.

13. Though we have held that the appellant is not entitled to question the quantum of compensation, awarded by the Tribunal as it is not one of the grounds that could be urged by the insurance company under section 96 (2), we however proceed to deal with the appellant's contention in the appeal regarding the quantum of compensation, as it was also argued. In this case, the wife of the deceased was aged only 19 years at the time of the death of the deceased who was aged 23 years. There is clear evidence that he was earning a minimum sum of Rs. 7 per day. The employer, P.W. 3, has given evidence that he is a permanent worker and he was earning anything between Rs. 7 and Rs. 12 per day. The Tribunal appears to be right in holding that out of his earnings, a sum of Rs. 70 be taken as the monthly dependency of the claimant. On that basis, the annual dependency works out to Rs. 840 and even taking thirty years as the remaining span of life of the deceased, the compensation will easily work out to more than Rs. 20,000. We do not, therefore, see that the compensation fixed in this case by the Tribunal is in any way excessive.

14. In any view of the matter the appeal has to be dismissed and it is dismissed accordingly with costs of the first respondent.

15. For the reasons stated in the main judgment in C.M.A. No. 534 of 1975, this petition is dismissed.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*V. Ramaswami, J.*

The Management of Hackbridge Hewittic and Easun Limited, Madras-19 .. *Petitioner**

v.

The Presiding Officer, Industrial Tribunal, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10 (1) (d)—Factory—Stoppage of work by Management—Dispute referred to Tribunal—Stoppage of work whether closure or lock-out—Dispute whether framed properly.

According to the management of a company the factory had to be closed down because of competition. Their work had been going down and ultimately since April, 1976, the factory was kept closed. On 26th October, 1976 the management issued a notice under section 25-FF (A) of the Industrial Disputes Act to the workers intimating them of the closure of the business and factory with effect from 30th November, 1976 and informing them that their services would stand terminated with effect from that date. The Workers' Union contested that the closure was not genuine and thereafter the Government framed a dispute for adjudication by the Industrial Tribunal, whether the stoppage of work was a case of closure or lock-out. The management raised a preliminary objection to the competency of Government to refer the dispute in the terms as set out and to the jurisdiction of the Tribunal to go into that question. This

*W.P. No. 108 of 1978. *4th August, 1978.*

objection was overruled by the Industrial Tribunal. Against this, the management filed a petition under Article 226 of the Constitution.

Held: Though the *bona fides* or otherwise of a closure or the necessity therefor and whether it was necessitated by financial, economic or other considerations could not be gone into and could not be put as an issue or as an industrial dispute, the question whether there was in fact a closure or it amounted to a lock-out could be put as an issue or as an industrial dispute. The factual question of closure will necessarily involve the question of lock-out. If there was no factual closure in the sense in which the workmen were contending, namely, that there was no genuine closure, it would only mean that they had closed the place of employment for ulterior purposes or with a motive. That would lead to a question of raising a dispute that it was a lock-out and not a closure. Accordingly the reference by the Government was in order. [*Paras.* 3 *and* 4.]

Cases referred to—

Indian Metal and Metallurgical Corporation v. *The Industrial Tribunal, Madras*, (1952) 1 M.L.J. 481: 65 L.W. 269: A.I.R. 1953 Mad. 98; *Kalinga Tubes* v. *Their Workmen*, (1969) 1 L.L.J. 557: (1969) 1 S.C.J. 671: A.I.R. 1969 S.C. 90; *Indian Hume Pipe Company* v. *Their Workmen*, (1969) 1 L.L.J. 242: (1968) 2 S.C.J. 364: A.I.R. 1968 S.C. 1002.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 16 of 1977 on the file of the Industrial Tribunal, Madras and quash the preliminary order, dated 8th December, 1977, and made therein.

M. R. Narayanaswamy and *S. Jayaraman*, for Petitioner.

T. Feen Walter, for Respondents.

The Court made the following

ORDER.—The petitioner is the management of Hackbridge Hewittic and Easun Limited, Tiruvothiyur, hereinafter called the company, and it had two factories, one at Tiruvothiyur which may be called Factory No. 1, where the company is manufacturing power transformers and it is functioning from 1956, and the other at Eravanur, which may be called Factory No. 2, and this was set up in the year 1966 for the purpose of manufacture of small transformers. It is the case of the company that these two factories are distinct and separate industrial establishments situate in two different villages and also having separate licences under the Factories Act. Accordingly it was their case that in law as well as in fact they are two separate industrial undertakings. It appears that at the time when Factory No. 2 was established, some of the experienced workers from Factory No. 1 were transferred with their consent to Factory No. 2 and later on some new workers also were employed in the Factory No. 2. The total number of persons thus employed in Factory No. 2 was 83 at the time when the dispute arose. It is also not in dispute that there are about 493 workers working in Factory No. 1. It was the case of the company that due to severe competition from small-scale industries all over the country, there was difficulty in continuing production in Factory No. 2. The production was going down and ultimately the factory was kept closed, since April 1976. During the period of closure, there were some talks and negotiations between the workers and the management as to how best to revive the working in the factory. Ultimately on 28th September, 1976, the management gave a notice to the Government under section 25-FF (A) intimating them that for the reasons explained in the annexure to the letter, they are closing down their Factory No. 2 at Eravanur. They also stated that the number of workmen who would be affected by the closure and whose services would stand terminated on account of the closure was 80. In the annexure it was stated that in spite of their best efforts, due to competitive prices they were not able to make any profit and that there was no hope of reviving the manufacturing operations which were stopped on and from 20th March, 1976. On 26th October, 1976, the management also issued a notice under section 25-FFF of the Industrial Disputes Act, hereinafter called the Act, giving one month's notice to the workers, intimating them of the closure of the business and the factory with effect from 30th November, 1976, and informing them that their services will stand terminated with effect from that date, namely, 30th November, 1976. There was also an annexure to this notice which set out the reasons for the closure. The Hackbridge Hewittic and Easun Limited Employees' Union, Thiruvothiyur, hereinafter called the

Workers' Union issued to the Management a strike notice under Rule 59 of the Tamil Nadu Industrial Disputes rules, 1958. It was pointed out in the said notice that the workmen were always willing to co-operate with the management, that in spite of their best efforts to revive the working of the factory, the management illegally and without any warrant are trying to close down the factory. They further stated that the termination of the employment of the workmen concerned with effect from 30th November, 1976, was illegal and unjustified. They further informed the management that they will go on strike on any day after 14 days of the receipt of the notice unless the management withdraws the notice of closure of Factory No. 2 and does not give effect to the proposal to terminate the services of the workmen with effect from 30th November, 1976. In the statement filed along with the strike notice, as required under the rule 59 they had stated that the workmen considered that the company's extreme step of closure "is not genuine or *bona fide* and its intent is to vitiate the negotiations." They further stated that the consequent non-employment will be unjustified, as there was no warrant or justification for the proposal of the management. It appears that there was some sort of a conciliation before the Commissioner of Labour and the conciliation failure report was sent to the Government. Thereafter the Government in G.O. Rt. No. 412, Labour and Employment Department, dated 23rd February, 1977, referred for adjudication to the Industrial Tribunal, Madras, the following dispute under section 10 (1) (*d*) of the Act:

> "Whether the stoppage of work in Factory II of Hackbridge Hewittic and Easun Limited, Madras-19, with effect from 30th November, 1976, is a case of closure or lock-out and to what relief the workmen would be entitled?."

Before the Industrial Tribunal, the management raised a preliminary objection as to the competency of the Government to refer the dispute in the terms as set out above and the jurisdiction of the Tribunal to go into that question. It was contended before the Industrial Tribunal that the dispute that was raised by the workmen was relating to the closure of the Factory No. 2 and it was never contended by the Union or the workers that the action of the management was one of lock-out. Therefore the Government could not have referred the question as to whether it is a case of lock-out, to the Industrial Tribunal. The Industrial Tribunal overruled this objection and held that the reference was in order and directed the case to be posted for disposal on merits. It is against this order of the Industrial Tribunal overruling the preliminary objection that this writ petition has been filed.

2. The learned counsel for the petitioner contended that the question for closure could not form an industrial dispute within the meaning of section 2 (*k*) of the Act and that the petitioner has a fundamental right to close down the business and the reference on the question of closure is incompetent. He also contended that the workmen never raised a dispute that the action of the management amounted to a lock-out and that therefore even the case, whether it is a lock-out or not could not have been referred to the Industrial Tribunal.

3. In one of the earliest cases considered by this Court in the *Indian Metal and Metallurgical Corporation* v. *The Industrial Tribunal, Madras and another*[1], this Court held that as a citizen has got a right to carry on business, he is equally given liberty not to carry it on, if he so chooses. The Industrial Tribunal could adjudicate only on the question whether a particular lock-out was justified or not, but it cannot decide the question whether the employer can close down his business temporarily or for an indefinite period or permanently. The decision also pointed out some of the main differences between closing down a business and lock-out and held that closing down is distinct from lock-out. The proposition was further elaborated by the Supreme Court in *Kalinga Tubes* v. *Their Workmen*[2]. It was held that on no principle of industrial law, the Tribunal could go into the question as to whether the closure of an undertaking was for financial, economic or other considerations. In other words, the closure could be on any ground other than financial, economic or other considerations of a like nature and the *bona fides* or otherwise of the closure was irrelevant. There is also another earlier decision of the Supreme Court in *Indian Hume Pipe Company* v. *Their Workmen*[3],

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1. (1952) 1 M.L.J. 481: 65 L.W. 269: A.I.R. 1953 Mad. 98.

2. (1969) I L.L J. 557: (1969) 1 S.C J. 671: A.I.R. 1969 S.C. 90.

3. (1969) 1. L.L J. 242: (1968) 2 S.C J. 364: A.I.R. 1968 S.C. 1002.

in which it was held that in a series of decisions it has been laid down that it is not for Industrial Tribunals to enquire into the motive for closure to find out whether the closure is justified or not; and once the Tribunal finds that an employer has closed his factory as a matter of fact, it is not concerned with the question as to the motive which guided him and to come to a conclusion that because of the previous history of the dispute between the employer and the employees the closure was not justified, and such a closure cannot give rise to an industrial dispute. But in all these decisions and some of the decisions cited by the learned counsel for the petitioner, it was held that the question whether there was as a matter of fact a closure could be gone into and could be put as an issue between the parties. Thus, though the *bona fides* or otherwise of the closure or the necessity for the closure and whether the closure was necessitated by financial, economic or other, considerations could not be gone into and could not be put as an issue or as an industrial dispute, the question whether there was in fact a closure or it amounted to a lock-out could be put as an issue or as an industrial dispute. The learned counsel for the respondent-workmen pointed out that if the Tribunal were to give a finding that there was no factual closure, it would amount to a lock-out and therefore the dispute as referred by the Government for adjudication was the real and proper dispute which the Government could have and ought to have referred and in view of the same the preliminary objection has no force. There is great force in this argument of the learned counsel for the workmen. Lock-out is defined as meaning, "the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him". Closure has been held to mean a closure of the business and not the closing of the place of employment. If the Tribunal were to hold that there was no factual closure, it would only mean that either there was closure of the place of employment or suspension of work. It may also amount to refusal by an employer to continue to employ any number of persons employed by him. The factual question of closure will thus necessarily involve the question of lock-out. It is in those circumstances that the Government referred the dispute as to whether it is a case of closure or lock-out. The use of the word "case" in this reference is very important, because the case of closure will take in a dispute to the genuineness of the closure itself. As already pointed out in the narration of facts, the workmen in their own way were contenting all along that there was no genuine closure. In the conciliation proceedings before the Commissioner also they were maintaining that the "closure is not genuine or *bona fide*" and action of the management "would not amount to a real or genuine closure in the eye of law". Therefore it could not be stated that before the reference, there was no dispute as to the factual closure of Factory No. 2 at Eravanur. If there was no factual closure in the sense in which the workmen were contending, namely, that there was no genuine closure, it would only mean that they have closed the place of employment for ulterior purposes or with a motive. That would lead to a question of raising a dispute that it is a lock-out and not a closure.

4. Accordingly I am of the view that the reference by the Government was in order and the overruling of the preliminary objection by the Industrial Tribunal is not liable to be interfered with in this writ petition. The writ petition accordingly fails and it is dismissed. The second respondent will be entitled to the costs. Counsel's fee Rs. 250 (Rupees Two hundred and fifty only).

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and M.A. Sathar Sayeed, JJ.*

The Special Tahsildar (H.W.L.A.), **Srivilliputtur** ... *Appellant**

v.

Sri Pethavanallur Mayuranathasami Temple, Rajapalayam, through its Executive Officer .. *Respondent.*

(A) *Land Acquisition Act* (*I of* 1894), *sections* 4 (1), 23 *and* 48 (1)—*Notification by Government to acquire land for public purpose—Subsequent withdrawal of portion of notified land from acquisition—Fixation of compensation — Relevant date — Withdrawal of notification—Effect.*

(B) *Land Acquisition Act* (*I of* 1894), *section* 25 (1) —*Omission to make excess claim by claimant—No sufficient reasons given—Jurisdiction of Court to award excess compensation.*

Section 48 (1) of the Land Acquisition Act is an independent provision which acts on its own without reference to section 23 of the Act or any other provision thereunder. Under section 48 (1), Parliament makes it clear that completion of acquisition as notified is not compulsory and it is left to the discretion of the Government to withdraw from the acquisition any land of which possession has not been taken. The expression 'any land' obviously means any portion of the land. If, therefore, the Government has the liberty to withdraw from the acquisition any portion of the land which was the subject-matter of the notification as originally made under section 4 (1), then it is not open to the claimant to say that the notification issued under section 48 (1) is tantamount to or is equivalent to a fresh notification issued under section 4 (1). As the power exercisable by the State under section 48 (1) is independent and not referable to the original power under which it could act, it issued a notification under section 48 (1) and the order under section 48 (1) withdrawing a portion of the land originally notified as being unfit for a public purpose under section 4 (1) should not be understood and interpreted as a fresh notification under section 4 (1) and the property re-evaluated as on the date of the alleged fresh notification. [*Para.* 8.]

Under section 25 (1) of the Land Acquisition Act, the civil Court has no jurisdiction to grant an amount in excess of the amount granted by the Land Acquisition Officer when a claimant has refused to make a claim or has omitted to give sufficient reasons (to be allowed by the Judge) for failing to make such a claim. [*Para.* 5.]

The very fact that Government did not object to an enquiry into the grant of increased compensation before the civil Court is sufficient indicia that the civil Court was satisfied that the omission to make a claim was for sufficient reason. [*Para.* 7.]

Case referred to:—

State of Kerala v. *Ranga Iyengar Veera Raghavan Iyengar*, (1966) K.L.R. 98.

Appeal against the decree of the Court of the Principal Subordinate Judge, Ramanathapuram at Madurai in O. P. No. 8 of 1967.

The Additional Government Pleader, for Appellant.

T. Vadivel and *S. Rajaram*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—This appeal by the State is against the judgment of the Principal Subordinate Judge, Ramanathapuram at Madurai. The reason why this appeal was in the shelf of the High Court for nearly one decade cannot be explained. It is however, resurrected and brought before us, but with scanty record and with no sufficient typed papers for a Division Bench; yet with the assistance of counsel, we could gather the facts for the disposal of this appeal.

2. An extent of 2.18 acres of agricultural land in S. No. 289/1-B in Rajapalayam village was acquired along with some more extent of land for the public purpose of providing house sites for Katta Naickers. The notification under section 4 (1) of the Land Acquisition Act was made on 11th November, 1964. An year later, a portion of the above notified land was withdrawn from acquisition by the Government issuing a notification under section 48 (1) of the Land Acquisition Act. This withdrawal became necessary as the acquiring authorities were of the view that a portion of the land which was originally notified for acquisition was unsuitable for house-sites because there was an odai running in the middle of the land. Such a notification for withdrawal of the excess land not required for the public purpose was made on 17th November, 1965. In so far as the lie of the land which is acquired and which is

*Appeal No. 796 of 1969. 22nd February, 1978.

the subject-matter of acquisition is concerned, it is common ground that it is surrounded by the roads formed by the Rajapalayam Municipality. The Land Acquisition Officer enquired into the value of the land and whilst doing so found that the land sought to be acquired is government dry land and was registered as such in the records of the Rajapalayam village. The description as given by the Land Acquisition Officer thus establishes that the land was dry land and was classified as agricultural land. He evaluated the land with the assistance of the sales-statistics gathered by him. In the sales-statistics referred to by him, he took into consideration the sales of small extents of land in the vicinity of the acquired land. In particular he relied upon such sales which took place in S. No. 161/3. In sales particulars given by the Land Acquisition Officer, we find three such particulars on record. The first sale in S. No. 161/3 of the year 1963 gave a price of Rs. 10,888 per acre. The second sale in the same survey number but of the month of July, 1963, gave a price of Rs. 8,000 per acre. The third sale which was in the month of August, 1963, gave a price of Rs. 6,667 per acre. The Land Acquisition Officer adopted the last price fetched for a portion of the land sold in S. No. 161/3 and he was of the view that that would be the rate at which the fair price of the acquired land should be evaluated. He found that the said data lands are only about one furlong from the land to be acquired and in respect of tharam, soil and fertility, both S. No. 161/3 and S. N. 289/1-B are comparable land. When he took up the enquiry, the owner who is Sri Pethavanalloor Mayuranathaswami Devasthanam, Rajapalayam, did not prefer a claim about the quantum of compensation in spite of notice having been served on the Devasthanam to make such a claim. Finally, at the time of the award enquiry, the Executive Officer of the Devasthanam, not only failed to make a claim but did not give the rate of compensation at least, which he thought would be the scale for assessing the just compensation for the acquired land. In this state of affairs, the award was passed by the Land Acquisition Officer on 21st September, 1966, but without any claim as such for compensation having been made by the Devasthanam before the said officer. But the Devasthanam, however, sought for a reference under section 18 (1) of the Land Acquisition Act for enhancement of the compensation awarded. On such an application, the subject-matter was referred to the civil Court and the learned Subordinate Judge was of the view that the acquired land has to be valued as on 17th November, 1965, and not as on 11th November, 1964, since, according to him, a revised notification under section 4 (1) has been published or re-issued on 17th November, 1965. We have already referred to the fact that the Government decided to take out of consideration and compulsory acquisition one portion of the originally notified land for the public purpose aforesaid and such a notification under section 48 (1) was made on 17th November, 1965. The learned Subordinate Judge was of the view that that ought to be the date on which the property has to be valued. He relied upon Exhibit B-2 which the Land Acquisition Officer himself took into consideration fixing the value of the acquired land. Whilst the Land Acquisition Officer fixed the value at Rs. 6,667 per acre, the Court below raised the compensation to Rs. 15,000 per acre on two grounds. Firstly, it thought that the date of notification on which the property had to be evaluated should be 17th November, 1965, and secondly, the same being two years after the date on which the sale took place under Exhibit B-2 and also giving such due weightage to the lapse of time between the date of sale under Exhibit B-2 and the date on which, according to the lower Court, the property has to be evaluated, it granted a compensation at the rate of Rs. 15,000 per acre. It is as against this the State has preferred the present appeal.

3. Srimathi Vimala, learned counsel for the Government raised three contentions before us. Firstly, she would say that in the absence of any statement by the claimant either in the shape of a quantified claim or at least in the nature of a claim setting forth the rate at which the owner sought for compensation and no application in writing having been made under section 25 (2) of the Land Acquisition Act to show that there was sufficient reason for not making such a claim before the Land Acquisition Officer the grant of compensation in excess of that awarded by the Land Acquisition Officer is without jurisdiction. Secondly, the contention was that in the absence of anything under the provisions of the Land Acquisition Act, which prompted the civil Court to call upon the claimant before it to make such a claim for increased compensation and show justifiable reasons for not having made such a claim before the Land Acquisition Officer, the Court below *suo motu* ought not to have increased the compensation. Thirdly, it is said that as the above two contentions are

matters inextricably connected with the jurisdiction of a civil Court it could be raised in this Court, even though such a plea either expressly or by necessary implication was not taken before the learned Subordinate Judge of Ramanathapuram. Lastly, the contention more or less bordering partly on facts and partly on law is that the lower Court was wrong in having evaluated the property as on 17th November, 1965, on the assumption that a notification issued under section 48 (1) of the Land Acquisition Act tantamounts to a fresh notification under section 4 (1) of the Act.

4. On the other hand, Mr. Peter Francis would say that as the lower Court granted an excess compensation it should be reasonably presumed that there was such a request for an increased grant and the formality of a written application for showing such need for an increased compensation before the Land Acquisition Officer ought to be condoned, or in any event, ought to be presumed on the facts and circumstances of the case. Government counsel would, however, say that there is no duty cast on civil Courts to help a litigant who by his indolence did not conform to law.

5. It is no doubt true that under section 25 (1) of the Land Acquisition Act, the civil Court has no jurisdiction to grant an amount in excess of the amount granted by the Land Acquisition Officer when a claimant has refused to make a claim or has omitted to give sufficient reasons (to be allowed by the Judge) to make such a claim. On a fair appraisal of the record which, as we prefaced earlier, is not full and complete, because of the lapse of time, we are unable to say that the claimant has refused to make a claim in this case: Even the Land Acquisition Officer would record that at the time of the award enquiry, the Executive Officer stated that he would give the details about the compensation after the meeting of the Trust Board. However, no such claim was made before the Land Acquisition Officer before the passing of the award.

6. The question is whether in the circumstances there has been an omission with sufficient cause to make such a claim. It is pertinent to observe that in the lower Court no objection was taken by the Government regarding the enquiry into the grant of excess compensation, in the sense, in excess of the compensation granted by the Land Acquisition Officer. This passive attitude by the State in the lower Court at a time when it ought to have objected to an enquiry into the grant of compensation in excess of the amount granted by the Land Acquisition Officer is a pointer to the fact that the Court might have been apprised orally of a request for such enhanced compensation and that the Court might have been satisfied that there was sufficient cause or reason for condoning the omission. We are not called upon in this case to answer the contention raised by Smt. Vimala that in all such cases where-an increased compensation is asked for, a written application should be made by the claimant and that would be the only process which would qualify a civil Court to entertain an application for the grant of increased compensation. Whilst there is some force in this contention, we are not inclined to go into it for the reason that neither at the stage when the State Government ought to have acted and pleaded, nor at the time when it came to this Court in 1969 with a memorandum of grounds of appeal the specific objection was taken by the Government that the civil Court had no jurisdiction to grant a compensation higher than that given by the Land Acquisition Officer, except that there was no written application for condonation of the indolence on the part of the claimant.

7. In fact, Padmanabhan, J., had occasion to consider a similar circumstance while dealing with *K. Ramaswami Reddiar* v. *Special Tahsildar (Harijan Welfare, Tindivanam)*[1] and he accepts generally the equitable principles touched upon by Vaidialingam, J., in *State of Kerala* v. *Ranga Iyengar Veera Raghavan Iyengar (died) Krishna Iyengar, Heir*[2] who said that in the absence of any issue having been framed on this aspect before the civil Court and as that aspect cannot be squarely treated as a pure question of law because so long as jurisdiction is vested in the Court before whom the reference for enhanced compensation is made, to consider the question as to whether even if there had been an omission or refusal to make a claim before the Land Acquisition Officer, whether that refusal or omission was without sufficient cause and a party is given, so to say, an opportunity to satisfy the Court that such omission or refusal was for sufficient reason. We are inclined to agree with this and hold that the very fact that the Government did not object to an enquiry into the grant of an increased compensation before the civil Court is sufficient indicia that the civil

1. A. S. No. 31 of 1975 dated 9th January, 1978.
2. (1966) Ker L. R. 98.

Court was by necessary implication satisfied that the omission to make a claim was with sufficient reasons. We have expressed already that for the purpose of this case, it is not necessary to speak any more on this legal contention raised by Smt. Vimala.

We may also add, however, that as this objection has not been taken in the memorandum of grounds of appeal, we are not inclined to lay greater accent on this objection at this stage but feel satisfied by expressing our view that the Government never intended to oppose the grant of excess compensation if really such a grant was justified on the facts and circumstances of the case.

8. The next point urged, of course, has real force and has to be sustained. Section 48 (1) of the Land Acquisition Act is an independent provision which acts on its own without reference to section 23 of the Land Acquisition Act or any other provision thereunder. Under section 48 (1) the Parliament makes it clear that completion of acquisition as notified is not compulsory and it is left to the discretion of the Government to withdraw from the acquisition of any land of which possession has not been taken. The expression of 'any land' obviously means any portion of the land. If therefore the Government has the liberty to withdraw from the acquisition any portion of the land which was the subject-matter of the notification made originally under section 4 (1) then it is not open to the claimant to say that the notification issued under section 48 (1) tantamounts to or is equivalent to a fresh notification issued under section 4 (1) of the Land Acquisition Act with reference to the left out portion. It is common ground that the totality of the land which was to be compulsorily acquired for the public purpose of providing house-sites for Katta Naickers in Rajapalayam was undertaken by the Government and according to the process so put into action, two S. Nos. 288/2 measuring about 14 cents and 289/1-B measuring about 3.01 acres, were to be acquired. Later it was discovered that there was an odai running in the middle of S. No. 283/2 and in consequence a portion of S. No. 289/1-B also could not be fruitfully utilised for the public purpose and therefore a notification under section 48 (1) was issued withdrawing from the acquisition S. No. 288/2 and portion of S. No. 289/1-B as both those portions of land were unsuitable for use as house-sites because of the presence of an odai running in the middle of those portions. It was in the above circumstances that the extent of land originally notified was reduced by the subsequent issuance of the notification under section 48 (1). As the power exercisable by the State under section 48 (1) is independent and not referable to the original power under which it could act, it issued a notification under section 48 (1) and it cannot be said that an order under section 48 (1) withdrawing a portion of land originally notified as being unfit for a public purpose under section 4 (1) should be understood and interpreted as a fresh notification under section 4 (1). and the property re-evaluated as on the date of the alleged fresh notification. This assumption on the part of the learned Subordinate Judge that the order made on 17th November, 1965 withdrawing a portion of the land from acquisition would amount to reissuance of a notification under section 4 (1) is incorrect and has to be set aside. We accept the argument of Smt. Vimala that the withdrawal of a part of the land under orders of the Government under section 48 (1) would not impinge upon the date on which the lands originally notified under section 4 (1) of the Act have to be valued under section 23 of the Act.

9. If therefore the land has to be valued as on 11th November ,1964, only, then, what would be the reasonable compensation payable, is the question. We are unable to agree with the Court below that a sum of Rs. 15,000 per acre ought to be granted as compensation for the land in question. The lower Court rightly rejected Exhibits A-2 to A-7 which were filed by the claimant for the first time before the civil Court. Exhibits A-2 to A-5 relate to sales of land abutting the trunk road and are to the west of the railway line besides being far away from the acquired land. Exhibits A-7 and A-8 lands are in the midst of a built-up area and therefore those sales were not rightly taken by the Court below for the purpose of comparing. We are therefore again left with Exhibit B-2. We have already referred to the fact that the Land Acquisition Officer noted the sales in S. No. 161/3 in the year 1963. One of such sales related to the hypothesis provided for under Exhibit B-2. There were three such sales in the year 1963. The price paid thereunder ranged between Rs. 6,667 per acre, as in Exhibit B-2 to Rs. 8,000 and Rs. 10,888. The average price fetched by these sales amounts to Rs. 8,500. The grant of Rs. 15,000 per acre cannot certainly be justified. Having regard to the lapse of of time as between August, 1963, when the sale under Exhibit B-2 took place and November, 1964,

which is the month of the notification which ought to be taken for the purpose of evaluation and in the light of the finding of the Court below that the prices of land in the locality have been showing a definite upward trend, we fix the value of the acquired land at Rs. 8,500 per acre. We have also borne in mind that the land acquired is of an extent of 2.16 acres while the compared lands are much smaller in extent at the time when they were sold. Taking all such factors into consideration, the price for the compulsorily acquired land is reduced to Rs. 8,500 per acre and compensation shall be granted on that basis together with the usual solatium and the interest at 4 per cent. on the enhanced compensation from the date of taking possession till date of payment. The appeal is therefore allowed in part. No costs. As regards the rest of the claim, the appeal is dismissed. No costs.

R.S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Amnia Bivi represented by power agent' K.M. Raja Mohammad .. *Petitioner**

v.

Abdul Jabbar .. *Respondent*

Civil Procedure Code (*V of* 1908), *Order* 26, *rule* 5—*Application to appoint Commission to examine person in Malaya—Proper approach—Interference with exercise of discretion by lower Court, when justified.*

There is a difference between a party witness and third party witness. Although in the Code of Civil Procedure, there is no distinction drawn as regards this point between the plaintiff, the defendant or the witness, yet, as a rule of prudence, this rule has been supplied. Normally a party would not be allowed to be examined on commission. Even as between the parties a vital distinction between the plaintiff and the defendant has to be kept up. When a plaintiff asks for a commission to examine himself, the Court would not normally accede to such a request unless a very strong case is made out. However, the case would be difficult where the application is made by a defendant and especially a defendant who is normally outside the jurisdiction of the Court. The Court need not view the case of the defendant with the same strictness as the case of the plaintff. In the case of a third party witness, he stands on a different footing; because he is not interested in the subject-matter of the litigation and he is a third party in the action. Moreover the very provisions of Order 16, rule 19 of the Code of Civil Procedure, come to his rescue. [*Paras.* 5, 6 *and* 8.]

The lower Court had wrongly equated the person sought to be examined on commission to a plaintiff and declined to issue a commission when really the person was to be examined only as a witness. In the circumstances, the order refusing the commission cannot be upheld. [*Para* 9.]

Cases referred to:—

A.R. Lakshmanan Chettiar v. *Vadivelu Ambalam*, 80 L.W. 148: (1967) 1 M.L.J. 252; *Ramakrishna Kulwant Rai* v. *P.E. Hardcastle and Company*. (1962) 2 M.L.J. 490: 75 L.W. 676: A.I.R. 1963 Mad. 103; *Subramania Chettiar*, In re, (1954) 1 M.L.J. 449: A.I.R. 1955 Mad. 210; *Filmistan (P.) Ltd. Bombay* v. *Bhawandas Sant Prakash*, A.I.R. 1971 S.C. 61.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Mayuram dated 22nd September, 1977 and made in I.A. No. 714 of 1976 in O.S. No. 93 of 1974.

K. Chandra Mouli, for Petitioner.

V. Sridevan and *R. Balachander*, for Respondents.

The Court made the following

ORDER.—The plaintiff in O.S. No. 93 of 1974 on the file of the Subordinate Judge, Mayuram, is the petitioner in this revision. The respondent herein is the defendant in the said suit. The plaintiff filed I.A. No. 744 of 1976 under Order 26, rule 5 of the Civil Procedure Code, to appoint a Commissioner for examining one Abdul Wahab or issue a letter of request addressed to the Presiding Officer of the Court within whose jurisdiction the said Abdul Wahab resides requesting him to appoint a Commissioner and to have the said Abdul Wahab examined by such Commissioner and forward the evidence to the lower Court. There were other suits O.S. Nos. 92, 94 and 121 of 1974 on the file of the Sub-Court, Mayuram. In those suits the said Abdul Wahab is a party plaintiff.

*C.R.P. No. 2962 of 1977. *17th July,* 1978.

2. Applications were also taken out by the plaintiffs in the said suits for the issue of commission to examine the said Abdul Wahab. There is no dispute that the said Abdul Wahab is in Malaysia and difficulties are being experienced with reference to going over to India so as to attend the Court below to give the required evidence. These applications were contested by the defendant in the said suits and the contentions of the defendant have been upheld by the Court below and the said applications have been dismissed. The present revision is filed against the orders of the Court below in I.A. No. 744/of 1976.

3. It is not in dispute that Abdul Wahab is a relevant witness. The necessary averments are found in paragraphs 12 and 14 of the affidavit which run as follows:

> "As stated above, Abdul Wahab is in Malaysia. After the suits were listed he was intimated of the said fact and he was required to proceed to India and to give evidence in the case. By his letter dated 21st August, 1976, addressed to my lawyer's clerk expressing inability to proceed to India and be present to give evidence on 20th September, 1976 (*sic*). He has further stated in letter that due to certain difficulties in the matter of arranging for the management of his business in Malaysia he is unable to proceed to India. (*sic*).
>
> Interrogatories may be submitted by both parties and answers may be elicited from Wahab by the Commissioner."

He is not only outside the jurisdiction of the Court below but he is at a place not within India, and hence the provisions of Order 26, rule 5 of the Civil Procedure Code are attracted. It is true that the order, subject-matter of this revision is essentially a discretionary order. But the Court has to exercise its discretion judicially as to granting or not granting a Commission and this Court would be very unwilling to interfere with the exercise of that discretion. If this Court saw that the discretion has been wrong lyexercised, if it saw that the case in all its bearings was not laid before the Court below, if it saw that the Court below misapprehended an important part of the case, this Court would interfere. The question is whether the facts of the present case come within the above dictum.

4. Thiru K. Chandra Mouli, learned counsel for the petitioner, submits that so far as O.S. No. 93 of 1974 is concerned, Abdul Wahab is not a party to the suit and hence the rule with reference to the examination of witnesses on commission alone should have been applied by the Court below and the rule with reference to the examination on commission of a person who is a party to the suit ought not to have been invoked and applied, and in the instant case, the Court below has not kept this in mind and has committed an error witb reference to the application of the correct principle with regard to the issue of a commission. Let us see as to whether there is substance in this submission.

5. Certain principles have been laid down by Courts with regard to issue of commission to examine witnesses. There is a difference between a party witnesses and a third party witnesses. Although in the Code of Civil Procedure, there is no distinction drawn as regards this point, between the plaintiff, the defendant or the witness, yet as a rule of prudence this rule has been supplied. Normally a party would not be allowed to be examined on commission. In *A.R. Lakshmanan Chettiar* v. *Vadivelu Ambalam*[1], Ananthanarayanan, C.J., observed that it would be an unusual privilege to exempt the party from attendance in Court merely because he was living beyond the limits of its jurisdiction and permitting him to be examined on commission.

6. Even as between the parties a vital distinction between the plaintiff and the defendant has to be kept up. When a plaintiff asks for a commission to examine himself, the Court would not normally accede to such a request unless a very strong case is make out. However, the case would be different where the application is made by a defendant and especially a defendant, who is normally outside the jurisdiction of the Court. The Court need not view the case of the defendant with the same strictness as the case of the plaintiff.

7. It would be relevant in the context to examine the observation of Jagadisan, J., in *Ramakrishna Kulwant Rai* v. *P. E. Hardcastle and Company*[2] which runs as follows:

> "The witness who is a third party to the action, cannot be compelled to attend Court to give evidence if he is resident at a

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1. (1967) 1 M.L.J. 252: 80 L.W. 148.

2. (1962) 2 M.L.J. 490: 75 L.W. 676: A.I.R. 1963 Mad. 103.

place beyond 290 miles from the Court-house; a party to a suit or proceeding has no such unqualified right. The plaintiff having filed the suit in a forum of his choice or in a forum where the suit had necessarily to be instituted, cannot, except in the circumstances of bodily infirmity or other disabling factors, avoid giving evidence in Court. A defendant, however, is in a slightly better position. If he is a resident in a far-off place quite a long way from the jurisdiction of the Court, he can pray for the issue of a commission to examine him as a witness .....The general rule is, and this should not be lost sight of or blurred, that the evidence of a witness in an action, be he or she a party or not should be given in public Court and tested by cross-examination. Inability to attend Court on grounds of sickness or infirmity or detriment to the public service, would justify the issue of a commission. The Court has got a discretion to relax the rule of attendance in Court where the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the Court. This discretion may be exercised even if the person happens to be no other than the defendant (see *Subramania Chettiar*, In re.[1] There can, of course, be no rule of law demarcating the boundaries and the area of the discretion to be exercised in these matters. What can however be stated is that the Court of Nisi Prius must judicially having regard to all the circumstances of the case, the desirability of the physical presence of the witness in Court to enable it to observe his or her demeanour and the not unusual fact that convenience and economy of expenses for the applicant may involve his opponent in great inconvenience and considerable expenses."

8. In the case of a third party witness, be stands on a different footing; because he is not interested in the subject-matter of litigation and he is a third party to the action. Moreover the very provisions of Order 16, rule 19, Civil Procedure Code, come to his rescue. As observed by the Supreme Court in *Filmistan (P.) Ltd., Bombay* v. *Bhawandas Santprakash and another*[2] the fact that the witnesses examined on commission cannot be affectively cross-examined or their examination will entail heavy costs are not sufficient circumstances to interfere with the discretion of the learned trial Judge.

1. (1954) 1 M.L.J. 449: A.I.R. 1955 Mad. 210.
2. A.I.R. 1971 S.C. 61.

9. I find that the Court below so far as O.S. No 93 of 1974 is concerned has not dealt with the matter separately from the other suits. The Court below observes as follows:

> "I may say at the outset that having regard to the nature of the suits and the pleas taken by the defendants and in view of the position occupied by the person, Abdul Wahab as he is the plaintiff in three suits is more or less the plaintiff in the other suit, namely, O.S. No. 93 of 1974; he should necessarily be examined in Court and not on commission."

The above observations make it clear that the Court below has entertained a mis-conception that Abdul Wahab must be equated to a plaintiff in O.S. No. 93 of 1974 when in fact he is not so. If this is so, he being sought to be examined only as a witnesses different considerations will have to weigh, and in particular with reference to the averments made in the affidavit and he cannot be compelled to attend Court to give evidence in O.S. No. 93 of 1974: In the said circumstances the equation of the said Abdul Wahab to a party to the suit O.S. No. 93 of 1974, by the Court below and its refusal to issue the commission cannot be upheld on the facts of the case.

10. In this view, I am inclined to interfere in revision and so far as O.S. No. 93 of 1974 is concerned the orders of the Court below are set aside and the application I.A. No. 744 of 1976 will stand allowed and I make it clear that the purport and scope of the commission will be confined to the matters in dispute in O.S. No. 93 of 1974. The Court below is directed to issue a commission or a letter of request as prayed for in accordance and the compliance with the provisions of the Code of Civil Procedure. Thiru Balachandar, learned counsel for the respondent expresses an anxiety with reference to the heavy costs for conducting the commission enquiry in a far off place. It goes without saying that in case the plaintiff fails in the suit and he is called upon by the Court below to pay the costs of the suit, the costs incurred by the defendant will naturally be borne by the plaintiff.

11. In the result the civil revision petition will stand allowed. No costs.

R.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Suryamurthy, JJ.*

The Special Tahsildar for Land Acquisition Municipal Cases, Madurai .. *Appellant**

v.

G. Venkatesan and others .. *Respondents.*

Land Acquisition Act (1 of 1894), section 49 (2) (3)—Scope—Land belonging to claimants—Notification to acquire for public purpose—Portion alone of notified land acquired—Balance severed—Owners raising objection that severed bits would be of no use—Demand to acquire entire extent—Acquisition by Government of left-over extent also—Fixing compensation—Method to be adopted.

The purpose of an order under section 49 (2) of the Land Acquisition Act is twofold. It is meant to save the claimants from suffering loss due to severance and concurrently it also saves the authority from suffering an excessive or unreasonable payment towards such severance compensation. Section 49 (2) of the Act has no field of operation of its own. But it is dependent upon a notification under section 4 (1) of the Act issued earlier and the order under section 49 (2) issued by the Government is not meant to give the claimants any right to prefer a fresh claim. If only such a right is available, as is available to an interested person when he was served with a notice under section 9 of the Act it could at least be comprehended that an order under section 49 (2) projects a distinct and separate right in the claimants to prefer a fresh claim without reference to and without having regard to the claim already made as to acquisition of a major part of the land as per notification under section 4 (1). A special significance is attached to the content and purpose of section 49 (3). Under sub-clause 3 of sections 49 of the Act, the processing of the subject-matter under section 6 to 11 has been dispensed with. Section 11 contemplates an inquiry by the Land Acquisition Officer and the passing of an award by him. If this is dispensed with should it mean that no award could be passed by the Collector and no compensation be paid for the land which has to be added on to the land compulsorily processed? [*Para.* 10.]

It is not the intention of the Legislature at all, for private property cannot be taken away without payment of just compensation. Under section 49 (2) of the Act, the State Government is the sole authority to decide whether the damages claimed under the head of "severance compensation" is excessive or unreasonable. When once it chooses to exercise its jurisdiction under section 49 (2) and issues a direction to the Land Acquisition Officer to acquire the whole of the land of which the land first sought to be acquired formed a part, then such subjective satisfaction of the appropriate Government is not open to challenge, and as a result of exercise of such power, the land which was left out of the area of the compulsory process, automatically gets into it by a legal fiction and becomes part and parcel of the land to be acquired pursuant to the notification under section 4 (1) of the Act. The option is vested in the Government either to accept the severance compensation claimed or to view it as excessive. The accretion of the left-over land with the land originally sought to be acquired being unquestionable, it follows that while awarding compensation the entirety of the land has to be acquired as if the notification under section 4 (1) of the Act enfolds within its mischief not only the land originally notified but also the land subsequently added. Invariably there would be some time lag between the notification under section 4 (1) and the order under section 49 (2), when in a given case such a contingency arises for consideration by the Government. This would not involve therefore the payment of compensation at two different rates and presumably at a higher rate for the land subsequently directed to be added on to the earlier notified land, for it is axiomatic that by passage of time the unearned increment would add an additional value to the land sought to be latterly acquired. [*Para.* 10.]

Under section 49 (3) of the Land Acquisition Act, no fresh declaration or other proceedings under sections 6 to 10 both inclusive should be necessary. But the only obligation on the part of the Collector is that he shall without delay furnish a copy of the order of the appropriate Government to the person interested and shall thereafter proceed to make his award under section 11 of the Act. [*Para.* 9.]

Case referred to:—

H. D. B.K. Das v. *F.L.A., Collector*, (1975) 2 S.C.C. 256: A.I.R. 1975 S.C. 1097.

*A. Nos. 552 to 556 of 1975 and Memorandum of Cross-objections therein. *9th February*, 1978.

Appeals and Memorandum of Cross-objections against the decree of the Court of the Subordinate Judge, Madurai, dated 11th December, 1972, and passed in O.S. Nos. 193, 192, 191, 190 and 189 of 1970, respectively.

The Additional Government Pleader, for Appellant

K. G. Manickavasagam and *R. Sugantharaj*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.:—These five appeals arise out of a common judgment rendered by the First Additional Subordinate Judge, Madurai, on references made to the Court by the aggrieved parties-claimants under section 18 of the Land Acquisition Act, hereinafter to be referred as 'the Act'. For the construction of a maternity home in Sundararajapuram area in Madurai town an extent of 31,467 sq. ft. in the first instance and an additional extent of 4,588 sq. ft. in S. No. 2003/ 1 was acquired pursuant to a notification under section 4 (1) of the Act dated 22nd September, 1965, and a Government Memorandum dated 16th March, 1970, issued by the Government under section 49 (2) of the Act. We shall in the course of our judgment consider the necessity for the Government to act under section 49 (2) of the Act. Pursuant to the notification under section 4 (1) of the Act, the original extent of 31,467 sq. ft. in the above survey number was acquired and it is in consequence of the memorandum dated 16th March, 1970, communicated to the respondents on 9th April, 1970, that the additional extent of 4,588 sq. ft. was acquired. Each respondent has an interest in one-fifth of the compulsorily acquired land. The Land Acquisition Officer, after due enquiry, passed an award on 30th May, 1970, and awarded a compensation at the rate of Rs. 1.04 per sq. foot, uniformly for the acquired area and evaluated the same as on 22nd September, 1965. On a reference by the claimants, the civil Court in its judgment appealed against, evaluated that portion of the land of an extent of 31,467 sq. ft. in T.S. No. 2003/1-A-2 at Rs. 5 per sq. foot as on 22nd September, 1965, and the other additional extent of 4,588 sq. ft. in T.S. No. 2003/1-A-1 at Rs. 7 per sq. ft. as on 16th March, 1970. The State aggrieved by the grant of compensation made by the Court below has preferred the above five appeals. The claimants, as respondents, have filed cross-objections in each of the appeals and are claiming compensation at the rate of Rs. 6 per sq. foot for the area comprised in T.S. No. 2003/1-A-2 and at th rate of Rs. 10 per sq. foot for the area comprised in T.S. No. 2003/1-A-1.

2. At the initial stage when the notification under section 4 (1) of the Act was made, it was proposed to acquire a part of the portion in T.S. No. 2003/1 out of which was carved out T.S. No. 2003/1-A-2 of an extent of 31,467 sq. ft. By the said proposal, an extent of 4,588 sq. ft. now comprised in T.S. No. 2003/1-A-1 was left out. The owners raised an objection that the severed bit of 4,588 sq. ft. would be of no use to them and therefore they demanded that the entire extent should be acquired. In order to avoid any excessive claim for severance compensation, the Government, on the advice of the appropriate and concerned authorities, issued orders on 16th March, 1970, invoking section 49 (2) of the Act directing the acquisition of the left-over area. This order of the Government was duly served on the owners on 9th April, 1970. After issuing due notices for enquiry, the Land Acquisition Officer fixed the valuation as above and which was increased by the civil Court on a reference.

3. It is common ground that each of the respondents is entitled to 7,211 sq. ft. in the acquired land. They filed various statements of objections before the civil Court and contended that the Land Acquisition Officer was wrong in having uniformly valued the land which is the subject-matter of the acquisitions and he ought to have made a distinction between the land originally acquired pursuant to the notification under section 4 (1) of the Act and the land subsequently directed to be acquired by the Government memorandum dated 16th March, 1970, under section 49 (2) of the Act. They sought for a distinct and separate valuation of the lands accordingly as on the two dates referred to above. On merits, their contention was that the market value fixed by the Land Acquisition Officer was very low.

4. In so far as the lie of the property is concerned, it is not in dispute that the acquired property is a building site in the midst of a thickly populated residential area and it is also very close to industrial establishments. It is within the Corporation limits of Madurai town and not far away from the Grand Southern Trunk Road which is a National Highway and it also abuts two municipal roads on two sides. There are many industries such as Rice Mills, Textile Mills and Saw Mills near the acquired land. Several Educa-

tional Institutions like Polytechnic and College are very near them. On the basis of such a location, the request was to fix compensation at a rate higher than that awarded by the Land Acquisition Officer. The Court below accepted the contention of the claimants that 31,467 sq. ft. has to be valued as on 22nd September, 1965 and the additional extent of 4,588 sq. ft. has to be valued as on 16th March, 1970. On the question of valuation, the Court below, on a consideration of certain documents referred to by it in the judgment, fixed the value of the larger extent at Rs. 5 and the smaller extent at Rs. 7 per sq. foot.

5. Before us Selvi Vimala, learned Government Advocate, raised two contentions, firstly, she would say that there is no legal basis for the Court below to distinctly and separately value the two extents of land on the supposition that the order passed under section 49 (2) of the Act would give the clue as well as the jurisdiction to the civil Court on a reference under section 18 of the Act to value, the left-over land and which was subsequently added on to the initially compulsorily acquired land as on the date of the order of the Government under section 49 (2) of the Act. After referring to the scheme of the Act with particular reference to sections 4, 5-A, 6, 7, 8, 9, 10, 11, 16, 23 and 49 of the Act, Selvi Vimala's contention is that the order under section 49 (2) of the Act is made with the purpose and intention of saving or preventing any damage that might accrue to the claimants in the event of the slicing of the land for the purpose of acquisition and leaving out a portion of it without being acquired. She would say that an order under section 49 (2) of the Act cannot, by any sense, be equated to a fresh notification under section 4 (1) of the Act for section 49 (2) of the Act is only an application of the earlier notification for acquisition under a contingency provided for by the statute itself. On the scheme of the Act, Selvi Vimala's contention is that it contemplates two contingencies, compensation for acquisition and 'compensation for severance.' In a case where the authority finds that the claim for severance compensation under clause 3 of section 23 (1) of the Act, is excessive or unreasonable, then the State has the option to act under section 49 (2) of the Act and acquire the entire land without leaving any portion of the totality of the land unacquired. As an order under section 49 (2) of the Act is not meant to give the claimants any right to prefer fresh claims, such an order cannot be a substitute for notification under section 4 (1) of the Act. As the vested power in the Government to invoke section 49 (2) of the Act in the contingency referred to above dispenses with the prescribed procedure under sections 6 to 11 of the Act, it should be taken that the legislative intent is that an order under section 49 (2) of the Act has no independent legal force or connotation of its own, but acts only as complement to the notification under section 4 (1) of the Act. Secondly she would also say that the method of evaluation adopted by the Court below is wrong and would urge for the reduction of the compensation amount.

6. Mr. K. Manickavasagam, learned counsel for the respondents, in all these appeals as also the cross-objectors, while seeking a higher compensation, desires to maintain the distinction in the method of evaluation adopted by the Court below. According to him section 49 (2) of the Act acts on its own without reference to section 4 (1) of the Act and the other provisions in the Act and thus understood the portion of the land which was acquired or added on to the main acquisition pursuant to the exercise of power by the Government under section 49 (2) of the Act should be evaluated as on the date of the order under section 49 (2) of the Act.

7. We entirely agree with the legal contentions of Selvi Vimala on the question that there cannot be two dates for evaluating the two bits of properties acquired for a common public purpose by reason of two propelling occasions, one, because of a notification under section 4 (1) of the Act and the other by reason of an order made by the Government under section 49 (2) of the Act. It is indisputable that lands which are compulsorily acquired by the State in exercise of their prerogative right to take private property for a public purpose, have to be compensated for and such compensation has to be fixed as on the date of the publication of the notification under section 4 (1) of the Act. There is no one provision in the Act which speaks of the evaluation of compulsorily acquired land under a different methodology. Sections 5-A, 6, 7, 8, 9, 10, 11 and 16 of the Act deal with follow-up action which the appropriate authority should take in the matter of publication of the declaration of the intended acquisition after hearing objections, marking the land to be acquired, enquiring into the claims for compensation that might be preferred by the aggrieved persons whose lands

have been notified for such an acquisition and ultimately for the passing of the award by the Collector and for taking possession of the acquired land. Section 23 of the Act which deals with the matters to be considered in determining compensation and which in so far as is relevant for our purpose speaks of severance compensation in the following terms. "In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration (thirdly) the damage (if any) sustained by the person interested at the time of the Collector taking possession of the land by reason of severing such land from his other lands." This is what is usually termed as severance compensation. If such severance compensation is made by a person as in this case, and if it appears to the appropriate Government that the claimant's claim for damages on account of the severing of the land to be acquired from his other lands is unreasonable or excessive, it may under section 49 (2) of the Act direct the Collector or the Land Acquisition Officer to acquire the whole of the land of which the land first sought to be acquired formed a part.

8. We may also refer to an observation made by the Supreme Court in *H.D.B.K. Das* v. *F.L.A. Collector*,[1] wherein the Court said that if a claim under the third clause of section 23 (1) of the Act is made, the requirement, of section 49 (2) of the Act is satisfied and that section 49 (2) of the Act gives the option to the Government only where the claim under the third clause of section 23 (1) of the Act is excessive.

9. Under section 49 (3) of the Act it is expressly provided that no fresh declaration or other proceedings under sections 6 to 10 both inclusive shall be necessary. But the only obligation on the part of the Collector is that he shall without delay furnish a copy of the order of the appropriate Government to the person interested and shall thereafter proceed to make his award under section 11 of the Act.

10. Mr. Manickavasagam would say that section 49 (3) of the Act has not been strictly complied with as the order made under section 49 (2) of the Act was communicated to the claimants on 9th April, 1970 and there was considerable delay in the matter of such communication. It is said that as there has been a delay in furnishing the copy of the order under section 49 (2) of the Act to the respondents in the appeals, it should be held that the order under section 49 (2) of the Act dated 16th March, 1970, in so far as the additional area of 4,588 sq. ft. is concerned, is an independent order which has the force of a notification under section 4 (1) of the Act. We are unable to agree. The purpose of an order under section 49 (2) is twofold. It is meant to save the claimants from suffering loss due to severance and concurrently it also saves the authority from suffering an excessive or unreasonable payment towards such severance compensation. Section 49 (2) of the Act has no field of operation of its own. But it is dependent upon a notification under section 4 (1) of the Act issued earlier and the order under section 49 (2) issued by the Government, as rightly stated by Selvi Vimala, is not meant to give the claimants any right to prefer a fresh claim. If only such a right is available, as is available to an interested person when he was served with a notice under section 9 of the Act, it could at least be comprehended that an order under section 49 (2) of the Act projects a distinct and separate right in the claimants to prefer a fresh claim without reference to and without having regard to the claim already made regarding the acquisition of the major portion of the land of an extent of 31,467 sq. ft. which as already seen was the result of a notification under section 4 (1) of the Act. A special signification is attached to the content and purpose of section 49 (3) of the Act. Under sub-clause 3 of the section 49 of the Act, the processing of the subject-matter under sections 6 to 11 of the Act has been dispensed with. Section 11 of the Act contemplates an enquiry by the Land Acquisition Officer and the passing of an award by him. If this is dispensed with, should it mean that no award could be passed by the Collector and no compensation be paid for the land which has to be added on to the parent land compulsorily processed? In our view this is not the intention of the Legislature at all, for private property cannot be taken away without payment of just compensation. Under section 49 (2) of the Act, the State Government is the sole authority to decide whether the damages claimed under the head of "severance compensation" is excessive or unreasonable. When once it chooses to exercise its jurisdiction under section 49 (2) of the Act and issued a direction to the Land Acquisition Officer to acquire the whole of the land of which the land first sought to be acquired formed a part, then such subjective satisfaction of the appropriate Government is not open to challenge, and as

1. (1975) 2 S.C.C. 256; A.I.R. 1975 S.C. 1097, 1099.

a result of the exercise of such a power, the land which was left out of the area of the compulsory process, automatically gets into it by a legal fiction and becomes part and parcel of the land to be acquired pursuant to the notification under section 4 (1) of the Act. The option is vested in the Government either to accept the severance compensation claimed or to view it as excessive. The accretion of the left-over land with the land originally sought to be acquired being unquestionable, it follows that while awarding compensation. The entirety of the land has to be acquired as if the notification under section 4 (1) of the Act enfolds within its mischief not only the land originally notified, but also the land subsequently added. We are unable to accept the contention of the learned counsel for the respondents that the two bits of land have to be valued on two different dates as was done by the Court below, as the principles of awarding compensation will not brook such an interpretation so as to give a lever to the claimants to take undue advantage against the acquiring authority. Invariably there would be some time lag between the notification under section 4 (1) of the Act and the order under section 49 (2) of the Act, when in a given case such a contingency arises for consideration by the Government. This would not involve therefore the payment of compensation at two different rates and presumably at a higher rate for the land subsequently directed to be added on to the earlier notified land for it is axiomatic that by passage of time the unearned increment would add as an additional value to the land sought to be latterly acquired. For all the reasons as above, we agree with Selvi Vimala on the first contention and we hold that the claimants cannot seek for two different methods of valuation of the two different parcels of land as above and ask for their evaluation on two different dates.

11. The surviving point is as to what is the just compensation for the entirety of the land consisting of 31,467 sq. ft., comprised in T.S. No. 2003/1-A-2 and 4,588 sq. ft., in T.S. No. 2003/1-A-1. The property has to be valued as on 22nd September, 1965, which is the date of the notification under section 4 (1) of the Land Acquisition Act. The Land Acquisition Officer 1 relied upon Exhibit B-1 dated 26th August, 1964, whilst the civil Court on a reference relied upon Exhibits A-4, A-2, and A-3 and awarded the compensation at different rates; he fixed the market value at Rs. 5 per sq. foot for the larger extent of land and at Rs. 7 per sq. foot for the smaller extent of land. In the view that we have expressed already, the property has to be uniformly valued. What then is the just compensation? The documents relied on by the Land Acquisition Officer relate to sales of land in Mallakulam village and not in relation to the lands within the municipal limits of Madurai. There is also necessary information from the records that the land comprised in Exhibit B-1 is land locked and no road is provided. The rest of the land cannot be built upon under the town-planning scheme in operation. As far as the acquired land is concerned, they have access through pre-existing roads and is situate in more important locality and inside the town. We are unable to, therefore, rely upon the data sales in Exhibit B-1 or B-2. The Court below relied upon a judgment of the High Court in A.S. No. 248 of 1965. *Abdul Mazid*-Appellant v. *The Special Tahsildar for Land Acquisition, Municipal Cases Madurai*-Respondent which concerned itself with land in T.S. No. 1937 which is not far away from the acquired land. The notification for acquiring the land in the above appeal was made on 25th April, 1962. A compensation of Rs. 4.50 per sq. foot was granted in that case. Taking into consideration that the notification in the instant case is about three years after the notification in the other appeal, the Court below granted Rs. 5 per sq. foot as compensation, though an attempt was made to refer to post-notification sales which we are not inclined to consider. Selvi Vimala strongly relies upon a sale under Exhibit A-6 which relates to a portion of the property acquired. Under this document, a price at Rs. 3-25 per sq. foot was secured for the land sold under it. But on an examination of the recitals in the sale deed, we find that the sale was in the year 1966 by the natural guardian of two minors as also the father. It is not clear from the date whether it was joint family property. In the absence of any order of Court under the Hindu Minority and Guardianship Act, 1956, it would not be safe to rely upon the price fetched under this document as the sole guide for valuation. But the price of Rs. 3.25 paid under it, though a few months after the date of the notification, can be one of the considerations for evaluation. It is in the light of this that reliance could be had on the value granted by the High Court for T.S. No. 1937, which is not far away from the acquired land. The High Court fixed the compensation at Rs. 4.50 per sq. foot for this land, as is seen from Exhibit A-3. One other

argument of the learned Government advocate is that the area of the acquired land is more than 10 grounds and this largeness in extent should be borne in mind while evaluating the lands. We have already stated th t the post notification sales sought to be relied upon by the claimants-respondents, which need not be set out in detail herein, cannot, in the circumstances, form or provide any guidelines for fixing the market value. Basing our conclusion on the value fixed by the High Court in Exhibit A-3 but in relation to the land in the vicinity under which a compensation of Rs. 4.50 per sq. foot was given to similar land but outside the municipal limits, in the year 1962, we fix the compensation as was done by the Court below at Rs. 5 per sq. foot for the entirety of the area. As we are unable to grant a higher compensation to the additional extent of 4,588 sq. ft. as was done by the Court below, the appeal of the State has to be allowed to that extent.

12. In the result, the compensation payable to the claimants in proportion to their entitlement is fixed at the rate of Rs. 5 per sq. foot and each of the respondents, in each of these appeals would be entitled to compensation at that rate. They would be also entitled to the 15 per cent solatium thereon and interest at the rate of 4 per cent from the date of taking over possession till the date of payment of such compensation amount, if it has not already been paid.

13. The appeals are, therefore, allowed to the extent indicated above. But there will be no order as to costs.

14. In the light of this, memorandum of cross-objections in each of these appeals are dismissed. There will be no order as to costs.

R.S. *Appeals partly allowed and Memo. of Cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N.S. Ramaswami, J.*

Ganesan ... *Appellant**

v.

K. Madurai Achari and another ... *Respondents.*

Tamil Nadu Occupants Kudiyiruppu (Protection from Eviction) Act (XXXVIII of 1961) *and Tamil Nadu Occupants Kudiyiruppu Act (Conferment of Ownership) Act (IV of* 1971)—*"Kudiyiruppu" —Definition—Matters relating to kudiyiruppu—Jurisdiction of Civil Court, if excluded.*

The definition of the word "kudiyiruppu" in section 2 (6) implies that it must be a site of any dwelling house or hut occupied, either as tenant or as licensee, by any agriculturist or agricultural labourer and includes such other area adjacent to the dwelling house or hut as may be necessary for the convenient enjoyment of such dwelling house or hut. An *Explanation* to the above definition purports to create a presumption. Whatever be the intention of the Legislature, the provision relating to the presumption is a dead letter. The presumption would arise only if it is established that the site is a kudiyiruppu. Therefore the person who is occupying the site claiming that it is a kudiyiruppu should establish that he is an agriculturist or an agricultural labourer. There is nothing in the *Explanation* to the definition of the word 'kudiyiruppu' purporting to create a presumption that any person occupying the kudiyiruppu is an agriculturist or an agricultural labourer. [*Paras.* 9 *and* 25.]

The special jurisdiction of the authorised officer (apart from that under section 4) is to enquire into and pass orders on application for eviction filed by any owner of a kudiyiruppu. The appeal to the Collector also relates to the same matter. Under this Act, no other question is within the special jurisdiction of the authorised officer or the District Collector. Particularly the question whether any house-site is a 'kudiyiruppu' or nor is certainly not within the special jurisdiction of the authorised officer and the District Collector. As a matter of fact, only in a case where it is admitted that the house-site is a kudiyiruppu, an application for eviction can be filed, for under section 5 only an owner of a kudiyiruppu seeking to evict can file an application before the authorised officer. In other words, only the owner who concedes that the site is a kudiyiruppu can go

*S. A. Nos. 2320 and 2321 of 1976. *23rd September,* 1977.

before the authorised officer for eviction. If the owner does not concede that it is a kudiyiruppu, his remedy is not to go before the authorised officer but only to come to the Civil Court. Of course, it would be open to the tenant to raise the question that the site is a kudiyiruppu as defined under the Act and that he is entitled to protection under the Act. In such a case, the civil Court has to go into the question whether the site is a kudiyiruppu or not. If it finds that it is not a kudiyiruppu, then the further questions, arising in the suit have to be determined and the suit is to be disposed of on merits. [*Para* 10.]

There are other situations where the civil Court would have necessarily to go into the question whether the site is a kudiyiruppu. In a suit for injunction on alleged attempted trespass or in a suit for possession on the allegation that the defendant is a trespasser, the latter might raise a contention that he is a tenant and the site is a kudiyiruppu. A person occupying a site or alleging that he is occupying the same and that it is kudiyiruppu might file a suit for injunction. In all such cases the civil Court has to decide the question as to whether it is a kudiyiruppu or not. Therefore there can be no doubt that the civil Court has jurisdiction regarding that question. [*Para*. 11.]

However, in a suit for ejectment or for possession, if the civil Court finds that the site is a kudiyiruppu, it cannot go into the question whether the tenant is entitled to the benefits of the Act; in other words, whether he is not liable to be evicted under section 3 (3). Eviction on the grounds mentioned in section 3 (3) can be only on an application to the authorised officer under section 5. It is within his special jurisdiction to find whether any of the grounds under section 3 (3) is made out on such application under section 5 being filed. [*Para*. 12.]

It is not possible to read these provisions as conferring exclusive jurisdiction on the authorised officer to decide the question whether a site is a kudiyiruppu or not. All that section 4 says that if there is a dispute as to whether an agriculturist or agricultural labourer was occupying a kudiyiruppu on the 19th June, 1971 (if he had so occupied, the ownership of the site would vest in him), this dispute has to be decided by the authorised officer. That does not mean that the question whether the site is a kudiyiruppu or not is within his exclusive jurisdiction. Also this Act is allied to the other Act, namely, the Kudiyiruppu Protection Act. Under that Act only an owner of a kudiyiruppu can approach the authorised officer to evict the tenant on any one of the grounds contained in section 3 (3) of the said Act, which pre-supposes that if the owner does not concede that the site is a kudiyirup u he cannot possibly go to the authorised officer. Under the Kudiyiruppu Ownership Act the question whether a site is a kudiyiruppu or not is within the jurisdiction of the civil Court. A decision by the civil Court on that point would be final. If, however, before any civil Court renders a decision on the question whether the site is kudiyiruppu or not, the dispute under section 4 (1) goes before the authorised officer, he may incidentally have to decide whether it is a kudiyiruppu. But if the civil Court has given a decision either way, that would be binding on the parties. [*Para*. 20.]

Cases referred to:—

Govindaswami Gounder v. *Ramaswami Gounder*, (1958) 2 M.L.J. 184: (1958) M.W.N. 393; *Ramachandra Sastrigal* v. *Kuppuswami Vanniar*, (1961) 1 M.L.J. 335; *Muhammed Sukri Sahib* v. *Madhava Kurup*, (1949) 1 M.L.J. 376: A.I.R. 1949 Mad. 809; *Muhammadunny* v. *Melappurakkal Unniri*, (1949) 1 M.L.J. 452: 63 L.W. 1059: I.L.R. (1950) Mad. 152: A.I.R. 1949 Mad. 765; *Thalai Vadiyu Anandar* v. *Venugopala Chettiar*, (1960) 1 M.L.J. 356; *Ethirajammal* v. *Hassan Kannee*, (1977) T.L.N.J. 326: 90 L.W. 597: A.I.R. 1977 Mad. 327; *Muniyandi* v. *Rajan am Iyer*, (1976) 1 M.L.J. 344: 89 L.W. 249: A.I.R. 1976 Mad. 287.

Appeals against the decree of the Court of the First Additional Subordinate Judge, Chingleput, in A.S. Nos. 135 and 136 of 1975 preferred against the decree of the Court of the Principal District Munsif of Chingelput in O.S. Nos. 663 and 608 of 1974.

Ramanujam, for Appellant.

Raj and Raj, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant in the two suits (O.S. Nos. 608 and 663 of 1974 on the file of the District Munsif's Court, Chingleput) has preferred these two second appeals. The question in both the cases is whether the defendant is entitled to the benefits of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) (Act XL of 1971), hereinafter referred to as the Kudiyiruppu Ownership Act,

and the Tamil Nadu Occupants of Kudiruppu (Protection from Eviction) Act (XXXVIII of 1961) hereinafter referred to as the Kudiruppu Protection Act, and whether the civil Court has jurisdiction to entertain the suits.

2. One Rajaram Naidu and others owned certain lands extending 2.89 acres of which the suit site (3 cents) is part. The defendant became a tenant of the suit site under the above owners as evidenced by Exhibit A-7 dated 20th March, 1973, which says that he had become tenant even two years prior to the date of the document. It is now common ground that he so became tenant in or about March, 1971. He put up a superstructure and has been enjoying the same. One Balasubramaniam purchased the land (including the suit site) under Exhibit A-3 dated 4th December, 1973. He sold half of the suit site (1½ cents) to the plaintiff in one of the suits and other half (1½ cents) to the plaintiff in the other suit, under the sale deeds, Exhibits A-1 and A-2, both dated 5th December, 1973. According to the plaintiffs, the defendant attorned the tenancy to them but failed to pay the rent and began asserting hostile title. They gave notice terminating the tenancy. The defendant totally denied the tenancy in his reply notice and stated that he had never paid rent to any one. He contended that the site is part of a poramboke and that neither the plaintiffs nor the vendor had any title to the same.

3. The plaintiffs filed the two suits. The defendant in his written statement reiterated his stand in the reply notice and contended that the sale deeds are sham and nominal and bogus. It was also contended that the defendant had an agreement for sale with the prior owners and that he was in possession in part performance of the contract. The written statement concluded by saying that the defendant was entitled to protection under the Kudiyiruppu Protection Act.

4. All these contentions were negatived by the trial Court. It also negatived the contentions put forward by the defendant at the trial that by virtue of the provisions contained in the Kudiyiruppu Protection Act and the Kudiyiruppu Ownership Act, the civil Court had no jurisdiction to entertain the suits. The defendant filed two appeals against the common judgment and decrees in the suit, but they failed. Hence these two second appeals by him.

5. The point raised by Mr. T. V. Ramanujum' learned counsel for the defendant (appellant) is that on the case of the plaintiffs and the findings of the Courts below that the defendant was a tenant in respect of the suit site. Section 3 of the Kudiyiruppu Ownership Act would confer title on the defendant to the same (3 cents), that in any event the defendant would be entitled to the benefits of the Kudiyiruppu Protection Act and that the civil Court has no jurisdiction to entertain the suits.

6. The first question is how far the provisions of the two Acts exclude the jurisdiction of the civil Court. The Kudiyiruppu Protection Act when it was originally enacted was meant to be a temporary provision. Sub-section (3) of section 1 as it originally stood said that the Act shall be in force for a period of nine years and later it was amended to the effect that it shall be in force for a period of twelve years. The said Act came into force on 29th November, 1961 and it had force only up to 1973. Subsequently, that is, by Tamil Nadu Act (XXIII of 1975) the Kudiysruppu Protection Act was re-enacted as a permanent measure. In the meanwhile, the other Act, namely, the Kudiyiruppu Ownership Act came into force with effect from 24th December, 1971.

7. Under this Act ownership was conferred on an agriculturist or an agricultural labourer occupying a kudiyiruppu on 19th June, 1971. There is provision for payment of compensation to the owner and recovery of such compensation from the occupier. At the moment it is enough to note that if the subsequent Act, namely, the Kudiyiruppu Ownership Act applied and thereby the person occupying the kudiyiruppu had become the owner, then there is no need to invoke the Kudiyiruppu Protection Act.

8. Under the former Act, an agriculturist or an agricultural labourer occupying a 'kudiyiruppu', which word is defined, can be evicted only as per the provisions contained in the Act. Section 3 states that save as otherwise provided in that Act, no person occupying any kudiyiruppu shall be evicted from such kudiyiruppu. Sub-section (3) of that section states that sub-sections (1) and (2) shall not apply to a person occupying a kudiyiruppu if he had been guilty of any negligence which is destructive of, or injurious to, the property belonging to the owner of the kudiyiruppu, or if he had wilfully denied the title of the owner of the kudiyiruppu. The *Explanation* states that a denial of the owner's title under a *bona fide* mistake of fact is not wilful within the meaning of the above clause. Section 4 provides for restoration of possession under-

certain circumstances. Section 5 states that any owner of kudiyiruppu seeking to evict for any of the reasons mentioned in sub-section (3) of section 3 has to apply for eviction to the authorised officer within whose jurisdiction the kudiyiruppu is situated. Section 6 provides for enquiry by the authorised officer and passing of orders on the aforesaid application while section 7 provides for an appeal by the aggrieved party to the District Collector. Section 11 of that Act says that no civil Court shall have jurisdiction in respect of any matter in which the authorised officer or the District Collector is empowered by or under the Act to decide. It further says that no injunction shall be granted by any Court in respect of any action taken or to be taken in exercise of any power conferred by or under the Act.

9. Now, turning to the definition of the word 'kudiyiruppu' which is in sub-section (6) of section 2, it is seen that it must be a site of any dwelling house or hut occupied, either as tenant or as licensee, by any agriculturist or agricultural labourer and includes such other area adjacent to the dwelling house or hut as may be necessary for the convenient enjoyment of such dwelling house or hut. There is an *Explanation* to the above definition which purports to create a presumption which I will deal with later. The word 'agriculturist' is defined in sub-section (3) thereof and it is similar to the definition contained in the Tamil Nadu Cultivating Tenants Protection Act, 1955, namely, that a person who cultivates agricultural land by the contribution of his own manual labour or of the manual labour of any member of his family.

10. It is to be noted that the special jurisdiction of the authorised officer (apart from that under section 4) is to enquire into and pass orders on applications for eviction filed by any owner of a kudiyiruppu. The appeal to the Collector also relates to the same matter. Under this Act, no other question is within the special jurisdiction of the authorised officer or the District Collector. Particularly the question whether any house-site is a 'kudiyiruppu' or not is certainly not within the special jurisdiction of the authorised officer and the District Collector. As a matter of fact, only in a case where it is admitted that the house-site is a kudiyiruppu, an application for eviction can be filed, for section 5 makes it clear that only an owner of a kudiyiruppu seeking to evict can file an application before the authorised officer. In other words, only the owner who concedes that the site is a kudiyiruppu can go before the authorised officer for eviction. That makes it absolutely clear that if the owner does not concede that it is a kudiyiruppu, his remedy is not to go before the authorised officer but only to come to the civil Court. Of course, it would be open to the tenant to raise the question that the site is a kudiyiruppu as defined under the Act and that he is entitled to protection under the Act. In such a case, what is to happen to the suit in ejectment filed by the owner in the civil Court? Undoubtedly the civil Court has to go into the question whether the site is a kudiyiruppu or not. If it finds that it is not a kudiyiruppu, then the further questions, arising in the suit have to be determined and the suit is to be disposed of on merits.

11. There are other situations where the civil Court would have necessarily to go into the question whether the site is a kudiyiruppu. In a suit for injunction on alleged attempted trespass or in a suit for possession on the allegation that the defendant is a trespasser, the latter might raise a contention that he is a tenant and the site is a kudiyiruppu. A person occupying a site or alleging that he is occupying the same and that it is a kudiyiruppu might file a suit for injunction. In all such cases the civil Court has to decide the question as to whether it is a kudiyiruppu or not. Therefore there can be no doubt that the civil Court has jurisdiction regarding that question.

12. However, in a suit in ejectment or for possession, if the civil Court finds that the site is a kudiyiruppu, then it cannot go into the question whether the tenant is entitled to the benefits of the Act; in other words whether he is not liable to be evicted under section 3 (3). Eviction on the grounds mentioned in section 3 (3) can be only on an application to the authorised officer under section 5. It is within his special jurisdiction to find whether any of the grounds under section 3 (3) is made out on such application under section 5 being filed.

13. Under analogous law, namely the Tamil Nadu Cultivating Tenants Protection Act, section 6 which is similar to section 11 of the Kudiyiruppu Protection Act, bars the jurisdiction of the civil Court in respect of any matter within the jurisdiction of the Revenue Court. Even so, the civil Court always had the jurisdiction to go into the question whether

a person is a cultivating tenant. By virtue of section 6-A of the Cultivating Tenants Protection Act, which was introduced by way of amendment, in a suit in ejectment the civil Court has to give a finding not only regarding the question whether the defendant is a cultivating tenant but also regarding the question whether he is entitled to the benefits of the said Act. If the civil Court finds in favour of the defendant on these two points, then the suit has to be transferred to the Revenue Court. In *Govindaswami Gounder* v. *Ramaswami Gounder*,[1] Panchapakesa Iyer, J., has held that in a case where the civil Court acts under section 6-A of the Cultivating Tenants Protection Act, it need not give a final finding regarding the question whether the defendant is a cultivating tenant or not and that if it is *prima facie* satisfied that the defendant is a cultivating tenant, it has to transfer the suit to the Revenue Court. But in *Ramachandra Sastrigal* v. *Kuppuswami Vanniar*[2] a Bench of this Court has held that the civil Court has to give a definite finding and not a mere *prima facie* finding.

14. There being no corresponding provision as section 6-A of the Cultivating Tenants Protection Act in the Kudiyirupppu Protection Act, there is no scope for the civil Court going into the question whether the defendant is entitled to the benefits of the Act (if it holds that the site is kudiyiruppu) and transferring the matter to the authorised officer. There is also no question of giving only a *prima facie* finding regarding the point whether the site is a kudiyiruppu or not. As I indicated earlier, there has to be a final finding inasmuch as that question is not within the special jurisdiction of the authorised officer.

15. Still the question remains as to what should be done by the civil Court once it finds that the site is a kudiyiruppu I am of the view that even though it is not to embark on the question whether the tenant is liable to be evicted under section 3 (3) that being a question within the special jurisdiction of the authorised officer, there is no bar for the civil Court to grant a decree for possession, subject to the provisions of the Kudiyiruppu Protection Act.

16. It has been held in a number of decisions of this Court that even in respect of a building governed by the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960,) the civil Court can pass a decree for possession (under the Transfer of Property Act)—Vide *Muhammed Sukri Sahib* v. *Madhava Kurup*[1], *Muhammadunny* v. *Melappurakkal Unniri*[2] and *Thalai Vadivu Anandar* v. *Venugopala Chettiar*[3]. But such a decree for possession would be subject to Act XVIII of 1960. In other words, if the building is governed by that Act, the decree cannot be executed without the landlord going before the Rent Controller under section 10 of that Act and establishing any one of the grounds thereunder for eviction. It would be a different matter if the civil Court comes to the conclusion that the building is outside the scope of Act XVIII of 1960. If it gives a finding then there would be no occasion for the landlord to go before the Rent Controller for eviction. If the civil Court passes a decree for possession after holding that the building is outside the scope of Act XVIII of 1960, then it would not be open to the executing Court to go behind it (see my judgment dated 10th August, 1977, in *Ethirajammal* v. *Hassan Kannee* alias *N.M. Hassan*[4], S.A. No. 1565 of 1976.

17. I do not see why the principle enunicated in the decisions under Act XVIII of 1960 referred above are not applicable to a case where the civil Court holds that the site is a kudiyiruppu. As I said, it can pass a decree for possession under the Transfer of Property Act, if the plaintiff is entitled to possession. Of course the decree should make it clear that the same is subject to the provisions of the Kudiyiruppu Protection Act.

18. Now coming to the provisions of the Kudiyiruppu Ownership Act, the definitions are the same as in the other Act. Section 3 says that save as otherwise provided in the Act, any agriculturist or agricultural labourer who was occupying any kudiyiruppu on the 19th June, 1971, either as tenant or as licensee shall with effect from the date of the commencement of the Act be the owner of such kudiyiruppu and such kudiyiruppu shall vest in him absolutely free from all encumbrances. Sub-section (2) of the said section vests absolute title in such agriculturist or agriculthural labourer in the superstructure also even if the same belongs to any other person. Sub-section (3) makes certain

1. (1958) 2 M.L.J. 184; 1958 M.W.N. 393.
2. (1961) 1 M.L.J. 335.

1. (1949) 1 M.L.J. 376: A.I.R. 1949 Mad. 809.
2. (1949) 1 M.L.J. 452: I.L.R. 1950 Mad. 152: 63 L.W. 1059: A.I.R. 1949 Mad. 765.
3. (1960) 1 M.L.J. 356.
4. 90 L.W. 597: A.I.R. 1977 Mad, 327.

exceptions. Section 4 (1) says that if any dispute arises whether any agriculturist or agricultural labourer was occupying any kudiyiruppu on the 19th June, 1971 for purposes of section 3 of the Act, such dispute shall be decided by the authorised officer. Sub-section (2) of the said section speaks of the procedure to be followed by the authorised officer. Section 5 provides for appeal to the District Collector. Section 6 relates to payment of compensation to the person having interest in the kudiyiruppu. Section 7 relates to determination of compensation, while section 8 provides for an appeal to the civil Court (which word is defined) against the decision regarding compensation. Section 9 is about the apportionment of compensation while section 10 is about payment of compensation. Section 11 speaks of a second appeal to the High Court against the decision of the civil Court under certain circumstances. Section 23 regarding jurisdiction is similar to section 11 of the Motor Vehicles Act. It is unnecessary to note the other provisions except to say that they relate to the mode of payment of compensation and the mode of recovery of compensation from the occupant of a kudiyiruppu, apart from certain other matters.

19. It is quite clear that the question of determination of compensation and allied matters are within the special jurisdiction of the authorised officer subject of course to appeal to the civil Court and a second appeal under certain circumstances to the High Court. Section 4 also confers special jurisdiction on the authorised officer to determine any dispute "whether any agriculturist or agricultural labourer was occupying any kudiyiruppu on the 19th June, 1971." Rule 3 of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Rules, 1972, made by virtue of section 27 of the Kudiyiruppu Ownership Act, contemplates an application for the settlement of a dispute under section 4 of the said Act to be made to the authorised officer having jurisdiction over the area within a period of two months from the date on which the dispute arose, with a proviso that the authorised officer may, for reasons to be recorded in writing, extend the period.

20. It is not possible to read these provisions as conferring exclusive jurisdiction on the authorised officer to decide the question whether a site is a kudiyiruppu or not. The Act nowhere says that such a question is one that has to be decided by the authorised officer. As already seen, all that section 4 says is that if there is a dispute as to whether an agriculturist or agricultural labourer was occupying a kudiyiruppu on the 19th of June, 1971 (if he had so occupied, the ownership of the site would vest in him), this dispute has to be decided by the authorised officer. That does not mean that the question whether the site is a kudiyiruppu or not is within his exclusive jurisdiction. It should also be remembered that this Act is allied to the other Act, namely, the Kudiyiruppu Protection Act. It was already noticed that under that Act only an owner of a kudiyiruppu can approach the authorised officer to evict the tenant on any one of the grounds contained in section 3 (3) of the said Act, which pre-supposes that if the owner does not concede that the site is a kudiyiruppu he cannot possibly go to the authorised officer. Therefore I am quite clear that even under the Kudiyiruppu Ownership Act the question whether a site is a kudiyiruppu or not is within the jurisdiction of the civil Court. A decision by the civil Court on that point would be final. If, however, before any civil Court renders a decision on the question whether the site is kudiyiruppu or not, the dispute under section 4 (1) goes before the authorised officer, he may incidentally have to decide whether it is a kudiyiruppu. But if the civil Court has given a decision either way, that would be binding on the parties.

21. Mr. Ramanujam, learned counsel for the defendant-appellant, referred to *Muniyandi* v. *Rajanagam Iyer*,[1] which arose under the Tamil Nadu Agricultural Lands Record of Tenancy Rights (Act X of 1969 as amended by Act XXXIV of 1972) and contended that even the question as to whether the site is a kudiyiruppu or not must be deemed to be within the jurisdiction of the authorised officer. The Division Bench which decided the above case has only held that as per section 16-A of that Act (which corresponds to section 11 of the Kudiyiruppu Protection Act and section 23 of the Kudiyiruppu Ownership Act relating to the bar of jurisdiction of civil Court) a civil Court has no jurisdiction to decide any matter which the Record Officer, District Collector or other officer or authority is empowered by or under the Act to determine. What matter or matters are within the special jurisdiction of the Record Officer, etc., has not been decided.

22. It may be noted that the provisions of the abovesaid Act relate only to the preparation of a record of tenancy rights. It does not

1. (1976) 1 M.L.J. 344: 89 L.W. 249: A.I.R. 1976 Mad. 287.

confer any other right on a cultivating tenant. His rights, as the law stands now, are only under the Cultivating Tenants Protection Act. Even that Act does not take away the jurisdiction of the civil Court regarding the question whether a person is a cultivating tenant or not. If in a suit, the question as to whether a party is a cultivating tenant or not arises, the civil Court has to decide it. If it decides that he is not a cultivating tenant, then the suit should be disposed of on merits. Hewever, because of section 6-A of the said Act, if it finds that the defendant in a suit is a cultivating tenant it has to transfer the suit to the Revenue Court.

23. In the judgment dated 5th January. 1977, in *Palaniswami* v. *Ramaswami Gounder and two others*,[1] Ramanujam, J., has held that section 16 A of the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act is not a base for the civil Court to entertain a suit for injunction and in such a suit the civil Court has to incidentally go into the question as to who is in possession of the property and in what capacity. If any party contends that he is occupying the land as a cultivating tenant, that question has necessarily to be gone into by the civil Court. Similarly if a suit for possession of agricultural land is filed and the defendant contends that he is cultivating tenant that question has necessarily to be gone into by the civil Court. That is the position even under the Cultivating Tenants Protection Act which provides for an application to the Revenue Court for eviction, of a cultivating tenant.

24. One question would be, if an entry in the register prepared under the Record of Tenancy Rights Act, has already been made and has become final, how far such an entry would be binding on the civil Court in deciding as to whether a particular person was in possession as a tenant or not. Section 15 of the said Act says that any entry in the approved record of tenancy rights shall be presumed to be true and correct until the contrary is proved or a new entry is lawfully substituted therefor. Therefore *prima facie* such an entry cannot be conclusive regarding the question whether the person concerned is a cultivating tenant or not. However it is unnecessary for me to express a final opinion on that point, in this case. It is enough to note that the decision reported in *Muniyandi* v. *Rajanagam Iyer*[2] would not help the defendant as it did not decide what is within the special jurisdiction and what is not, The above judgment does not say that the question whether a person is a cultivating tenant or not is within the special jurisdiction of the Record Officer. It does not say that the civil Court has no jurisdiction to investigate to such a question.

25. Now the remaining point for consideration is whether the suit site is a kudiyiruppu. I have already referred to the clause relating to presumption under the definition of the word 'kudiyiruppu' which says that any person occupying the kudiyiruppu is an agricultural labourer or an agriculturist until the contrary is proved. But on an examination of the provisions, I am clear that whatever be the intention of the legislature the above provision relating to the presumption is a dead letter. The presumption would arise only if it is established that the site is a kudiyiruppu. In order to establish that the site is a kudiyiruppu, it should be shown that the site or dwelling house or hut, as the case may be, is occupied by an agriculturist or agricultural labourer (either as tenant or as licensee). Therefore the person who is occupying the site claiming that the site, etc., is a kudiyiruppu should establish that he is an agriculturist or an agricultural labourer. Undoubtedly every house site or a dwelling house or a hut is not a kudiyiruppu. Needless to stress that the person occupying the same should be an agriculturist or an agricultural labourer to makeit a kudiyiruppu. Then there is no meaning in the *Explanation* to the definition to the word 'kudiyiruppu' purporting to create a presumption that any person occupying the kudiyiruppu is an agriculturist or an agricultural labourer.

26. It is not claimed by the defendant that he is an agricultural labourer. But the contention is that he is an agriculturist as defined in the Acts. As already noticed, an agriculturist is one who cultivates agricultural land by the contribution of his own manual labour or of the manual labour of any member of his family,

27. In the present case, apart from the laconic plea in the written statement that the defendant is entitled to the benefits of the Kudiyiruppu Protection Act, there is no averment of fact regarding the question whether the site is a kudiyiruppu or not. It is true that in the plaint the defendant is described as an agriculturist. But the question is whether he is an agriculturist as defined in the Act. In common parlance, even a person who owns agricultural land and cultivates the same through hired

1. S.A. No. 1496 of 1976.

2. (1976) 1 M.L.J. 344: 89 L.W. 249: A.I.R. 1976 Mad. 287.

labour is called an agriculturist, but under the definition, unless he contributes his own labour or that of any member of his family in the cultivation of the land, he would not be an agriculturist. The evidence in the case also does not support the contention that the site is a kudiyiruppu on the basis that the defendant who occupies the same is an agriculturist. The defendant as D.W. 1, has not said a word that either he or any member of his family contributes manual labour in the cultivation of agricultural lands. In chief-examination he stated that he owns agricultural lands and added that his mother also owns lands and that he is cultivating the same. In cross-examination he has stated:" ''எனக்கு பயிர்த் தொழில், கறிகாய் வியாபாரம் தொழில்.'' He conceded that he has no record to show that he was cultivating any land. Even assuming that the defendant was cultivating agricultural lands, there is absolutely no evidence to show that such cultivation was with the manual labour of himself or any member of his family. Under these circumstances, it is not possible to hold that the site is a kudiyiruppu.

28. In this view it is unnecessary to go into the question whether the Kudiyiruppu Ownership Act, applies, thereby the site vesting in the defendant or whether the Kudiyiruppu Protection Act applies in which event the defendant can be evicted only as per the provisions of that Act. The plaintiffs are entitled to a decree for possession without the same being made subject to the Kudiyiruppu Protection Act.

29. The decree for future damages granted by the Courts below which shall be determined in separate proceedings is also correct.

30. The appeals fail and they are accordingly dismissed. But under the circumstances of the case, there would be no order as to costs. Time for giving vacant possession, six months.

R.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*P. Govindan Nair, CJ. and A. Varadarajan, J.*

Chikkaraj .. *Appellant**

v.

K.N. Viswanathan .. *Respondent.*

Ramammal and another .. *Appellants**

v.

K.N. Viswanathan and another .. *Respondents.*

Deed—Construction—Nature of interest conferred, whether life interest or absolute interest.

Held, that, on a careful consideration of the terms of the partitiondeed in the instant case and the principles laid down in the decisions, the concerned document has to be read as a whole and attempt should be made to reconcile every part of the document, with what is stated in the other parts of the document. If such a course is adopted, what would follow in the present case is that '*K*' (father of the appellants) had only a life estate in the properties with full power of alienation over the properties during his lifetime and that in the event of '*K*' not exercising the power of alienation, as it turned out to be, those properties shall be taken, on his death absolutely by the appellants (his children) and that the right which the appellants so took is a vested right and not a contingent right. The properties concerned, therefore, were not the assets of '*K*' in the hands of the appellants and could not be attached in execution of the decree which the respondent had obtained against the assets if any of '*K*' in the hands of the appellants.

[*Para.* 13.]

Cases referred to:—

Raghunath Prasad Singh v. *The Deputy Commissioner*, (1930) 58 M.L.J. 1: 56 I.A. 372: 30 L.W. 619: A.I.R. 1929 P.C. 283; *Navaneetlal* v. *Gokul*, (1976) 1 S.C.C. 630: (1976) 1 A.P.L.J. (S.C.) 47: (1976) 2 S.C.R. 924: A.I.R. 1976 S.C. 794; *K. Kumaran* v. *M. J. Mattom*, A.I.R. 1957 Ker. 119; *Krishna Iyer* v. *Swaminatha Iyer*, (1918) 8 L.W. 140; *Govindaraja Pillai* v. *Mangalam Pillai*, (1932) 36 L.W. 733: 63 M.L.J. 911: A.I.R. 1933 Mad. 80; *Swarnamoyee* v. *Probadh - Chandra*,

*L.P.A. Nos. 39 and 40 of 1976. 8*th November*, 1977.

A.I.R. 1933 Cal. 253; *Hallifax* v. *Wilson*, (1809) 16 Ves Jun 168; *Kali Prashad* v. *Ram Golam*, A.I.R. 1937 Pat. 163; *Lakshmi Ammal* v. *Allauddin*, (1962) 2 M.L.J. 187: A.I.R. 1962 Mad. 247; *Ramasreenivasa Iyengar* v. *Padmasani Ammal*, (1973) 86 L.W. 456; *Ramaswamy Chettiar* v. *Venkatammal*, (1964) 77 L.W. 691: I.L.R. (1965) Mad. 41: A.I.R. 1965 Mad. 193; *Jabamalai Mariammal* v. *Madalaimuthu Thevar*, (1966) 79 L.W. 141; *Ramachandra* v. *Hilda Brite*; (1964) 2 S.C R. 722: A.I.R. 1964 S.C. 1323; *Pugalumperumal Pillai* v. *Thangathammal*, (1949) 62 L.W. 260; (1949) 1 M.L.J. 389: A.I.R. 1949 Mad. 690; *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy*, I.L.R. (1897) 24 Cal. 834: 24 I.A. 76: 1 Cal.W.N. 387; *Subbamma* v. *Ramanaidu*, (1937) 45 L.W. 153: (1937) 1 M.L.J. 268: A.I.R. 1937 Mad. 476; *Ratnasami Pillai* v. *Kathija Bivi Ammal*, (1950) 63 L.W. 963.

Appeals under clause 15 of the Letters Patent against the decrees of Mr. Justice N.S. Ramaswami dated 1st October, 1975 and made in A.A.O. Nos. 177 and 183 of 1977—Appeals preferred to the High Court against the orders of the Court of the Subordinate Judge of Coimbatore dated 7th November, 1974, and made in E.A. No. 1480 of 1974 in E.P. No. 96 of 1974 in O.S. No. 915 of 1970 and dated 27th November, 1973 and made in E.P.R. No. 304 of 1973 in O.S. No. 915 of 1970, respectively.

T.V. Balakrishnan, for Appellant.

S. Nainar Sundaram, *V. Natarajan* v. and *Nicholas* for Respondent.

The judgment of the Court was delivered by

Varadarajan, J.—These Letters Patent Appeals have been preferred against the judgment of N.S. Ramaswami, J., in A.A.O. Nos. 177 of 1975 and 183 of 1975, respectively.

2. The appeals before the learned Judge were filed by the decree-holder Viswanathan—A.A.O. No. 177 of 1975 against the order of the Subordinate Judge, Coimbatore, allowing E.A. No. 1486 of 1974 which had been filed by the fourth defendant (the appellant in L.P.A. No. 39 of 1976) under section 47 of the Code of Civil Procedure against the attachmen of a portion of the house property in execution of a decree as an asset of his father Kunne Gounder in his hands, and A.A.O. No. 183 of 1975 against the order of the Subordinate Judge of Coimbatore dismissing E.P. No. 304 of 1972 in which the respondent had attached certain shares in Lakshmi Mills as an asset of Kunne Gounder in the hands of defendants 7 to 9, the daughters of Kunne Gounder and the appellants, in L.P.A. No. 40 of 1976.

3. Kunne Gounder, the father of the appellants, who died on 27th August, 1967 appears to have been appointed as a trustee along with one Lingayi Gounder in the will executed in 1925 by one K. Nanjappa Gounder, the father of the respondent's adoptive father K.N.K. Nanjappa Gounder. The respondent's case was that Kunne Gounder and Lingayi Gounder had been appointed as trustees to manage the properties bequeathed to Nanjappa in the will with a direction that they should hand over the properties to Nanjappa on his attaining majority. The will contained a provision that Kunne Gounder and his male heirs should take the properties absolutely in case the legatee Nanjappa died without a male issue. The respondent's case is that on the legatee Nanjappa attaining majority. Kunne Gounder surrendered possession of only a part of the estate but not the shares in the *nidhis*. Kunne Gounder filed O.S. No. 22 of 1961 in the Sub-Court, Coimbatore, questioning the respondent's adoption by Nanjappa, but failed in that suit as well as in the Appeal No. 207 of 1963 which he had filed in this Court. After the dismissal of the appeal holding that the respondent had been validly adopted by Nanjappa and was entitled to the properties mentioned in the will, including the shares in the two *nidhis*, the respondent filed O.S. No. 915 of 1970 against the sons and daughters of Kunne Gounder subsequent to his death for recovery of the monies due under the shares and obtained a decree.

4. During the pendency of the said Appeal No 207 of 1963 Kunne Gounder and his sons and daughters got their properties divided by a registered partition deed, Exhibit A-1, dated 7th April, 1965. In that partition Kunne Gounder got for his share the properties mentioned in Schedule 'A' to the partition deed. Those properties consisted of some shares in a textile company called Lakshmi Mills and a small house forming a part of door No. 16/86, Okkiliyar Street, Coimbatore, besides cash of Rs. 5,000. According to the appellants, a major portion of the house property fell to the share of Chikkaraj, the appellant in L.P.A. No. 39 of 1976, and his three brothers in specific shares, and the portion allotted to the appellant was comparatively smaller than the portions

allotted to each of his brothers. Therefore, it was agreed that the portion of the house allotted to the share of the father should belong absolutely to the appellant in L.P.A. No. 39 of 1976, after the death of his father. This intention was clearly expressed in the partition deed. Similarly, the shares in Lakshmi Mills, allotted to the share of the father, were to be taken absolutely by his daughters, the appellants in L.P.A. No. 40 of 1976, after his death. This intention is clearly expressed in the partition deed, and as per the arrangement, the father got only a limited right in the portion of the house and all the shares in Lakshmi Mills allotted to his share in the partition in accordance with the common intention of all concerned. The appellants in L.P.A.No. 39 of 1976 become absolutely entitled to the portion of the house and the appellants in the other appeal became absolutely entitled to all the shares in Lakshmi Mills allotted to the share of their father on his death on 27th August, 1967. The decree obtained by the respondent on 5th December, 1972, in O.S.No. 915 of 1970 provides for recovery of the amount only from the assets of Kunne Gounder in the hands of the appellant and his brothers and sisters.

5. The respondent got the portion of the house and all the shares in Lakshmi Mills allotted to the share of the father Kunne Gounder in the partition attached in execution of the decree in E.P. No. 96 of 1974 and E.P. No. 304 of 1973, respectively, as the assets of the father Kunne Gounder in the hands of the appellants. The appellant in L.P.A No. 39 of 1976 therefore filed E.A. No. 486 of 1976 under section 47 of the Code of Civil Procedure praying for raising the attachment on the ground that the property was not an asset of Kunne Gounder in his hands but was his absolute property. The appellants in L.P.A. No. 40 of 1976 contended in E.P. No. 304 of 1973 that the shares in Lakshmi Mills, which the respondent got attached as an asset of Kunne Gounder in the hands of the appellants in L.P.A. No. 40 of 1976, were not Kunne Gounder's assets in their hands but were their absolute properties and therefore the attachment was not valid. The contention of the respondent in the objection filed in E.A. No. 1486 of 1974 and in his E.P. No. 304 of 1973 was that during the pendency of Appeal No. 207 of 1963 in the Court Kunne Gounder and his sons and his daughters effected a partition of the ancestral proportion of the family and the self-acquired properties of Kunne Gounder fraudulently without making sufficient provision for meeting the debts of the family, including the debt due to him for which he obtained a decree in O.S. No. 915 of 1970, with the obejct of defeating and delaying creditors and that the properties were the assets of Kunne Gounder in the hands of the appellants, and the attachments are therefore valid.

6. The Subordinate Judge, Coimbatore, who heard E.A. No. 1486 of 1974, found that the properties divided under the partition deed, Exhibit A-1, were joint family properties and that Kunne Gounder, to whose share the properties described in Schedule 'A' in the partition deed had been allotted, had only a life interest in those properties and the absolute interest in a portion of the house was to go to the appellant in L.P.A. No. 39 of 1976 on the death of Kunne Gounder. He further found that the appellant in L.P.A. No. 39 of 1976 had acquired a vested interest in that portion of the house under section 19 of the Transfer of Property Act and, therefore, the property was not an asset of Kunne Gounder in his hands. In that view, the Subordinate Judge allowed E.A. No. 1486 of 1974 and raised the attachment. Another Subordinate Judge, who heard E.P. No. 304 of 1973, came to the same conclusion and he dismissed E.P. No. 304 of 1973 holding that the shares were not the assets of Kunne Gounder in the hands of the appellants in L.P.A. No. 40 of 1976.

7. The decree-holder filed A.A.O. Nos. 177 and 183 of 1975 against the order allowing E.A. No. 1486 of 1974 and dismissing E P. No. 304 of 1973. The contention urged on behalf of the appellants herein before N.S. Ramaswami, J., who heard both the appeals, was that Kunne Gounder had only a life estate in the properties mentioned in Schedule 'A' to the partition deed, Exhibit A- 1, and that the appellants herein became absolute owners of those properties on his death and were not in possession of any of his assets and, therefore, the attachments were not valid. In the partition deed the 'A' Schedule properties had been allotted to the father Kunne Gounder while the 'B' Schedule properties had been allotted to the shares of the Appellant in L.P.A. No. 39 of 1976, and the properties mentioned in Schedules 'J', 'K' and 'L' had been allotted to the appellants in the other appeal. N.S. Ramaswami, J., found that as per the body of the partition deed, Exhibit A-1, the 'A' Schedule properties are to be taken by Kunne Gounder absolutely with powers of alienation and that in the 'E' Schedule, allotted to the share of the appellant in L.P.A. No. 39 cf 1976,

it is stated that he should take the portion of the house property mentioned in 'A' Schedule to the partition deed absolutely after the death of Kunne Gounder and that there is a similar provision in regard to the shares in Lakshmi Mills allotted to Kunne Gounder in the 'A' Schedule of the partition deed in the 'J', 'K,' and 'L' Schedules, *viz.*, that the daughters should take those shares absolutely on the death of Kunne Gounder. The learned Judge held that Kunne Gounder took an absolute estate in the properties in question and that the gifts over to the appellants herein were inconsistent with the absolute estate and therefore void. In coming to this conclusion the learned Judge relied upon the decision of the Privy Council in *Raghunath Prasad Singh* v. *The Deputy Commissioner, Partabgarh.*[1] The learned Judge allowed both the appeals observing that:

"I am of the view that under the partition deed Kunne Gounder took an absolute estate in respect of the 'A' Schedule property but indicated in the same document regarding the manner in which they are to be distributed, if these properties are available on his death, amongst his children. Otherwise, the latter clause in the document would be repugnant to the former."

Before we construe the partition deed, Exhibit A-1, in the light of the decisions placed before us by the learned counsel for the parties, we would like to refer to some portions of the of the judgment of the learned Judge. The learned Judge has observed in a portion of his judgment thus:

"I do not believe that the parties intended that Kunne Gounder should have only life estate in the property. It is not possible to hold that the subsequent clauses is a defeasance."

The body of the document, Exhibit A-1, which is in Tamil, no doubt states that the sharers should take the respective shares absolutely and enjoy them from generation to generation with absolute powers of alienation. The 'A' Schedule in the partition deed includes the shares in Lakshmi Mills and a portion of the house bearing door No. 16/86, Okkiliyar Street, Coimbatore. But it is stated in the 'A' Schedule itself that the appellant in L.P.A. No. 39 of 1976 should take the share in the house absolutely after the death of Kunne Gounder. There is a similar provision in the 'A' Schedule itself in regard to the shares in Lakshmi Mills and it is stated that those shares should belong absolutely to the appellants in L.P.A. No. 40 of 1976 after the death of Kunne Gounder. In the Schedule 'E' where the properties allotted to the share of the appellant in L.P.A. No. 39 of 1976 are mentioned, the share in the house allotted to Kunne Gounder also is included and it is stated that the appellant in L.P.A No. 39 of 1976 should take that share absolutely after the lifetime of Kunne Gounder. The shares in Lakshmi Mills allotted to the share of Kunne Gounder in Schedule 'A' to the partition deed have been put in Schedules 'J', 'K' and 'L' also and it is stated there that the appellants in L.P.A. No. 40 of 1976 should take those shares after the lifetime of Kunne Gounder. The intention of the parties appears to be that if Kunne Gounder had not alienated the properties allotted to his share in the partition under Exhibit A-1, during his lifetime, they should be taken absolutely by the appellants as indicated in the document. Therefore, it is not possible to agree with N.S. Ramaswami, J., that it is not possible to believe that the parties intended that Kunne Gounder should have only a life estate in the properties, for, it is clear that the parties appear to have intended that he should have a life estate in the properties with also a power of absolute disposition over the properties. N.S. Ramaswami, J., has observed in his judgment thus:

"It is not in dispute that the debt for which the appellant had obtained a decree is a pre-partition debt. Therefore, even if the properties dealt with under the partition deed are the joint family properties of Kunne Gounder and his sons, so long as the debt is not tainted with illegality or immorality, even the shares allotted to the sons would be answerable to that debt, unless it is shown by the sons that the partition is a *bona fide* one. That being so, if it has to be construed that the intention of the parties in this case was to confer only a life estate on Kunne Gounder in respect of the properties allotted to his share, it would not be a *bona fide* arrangement."

It is not possible to agree with this observation of the learned Judge, for the respondent has not proceeded in the suit

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1. (1930) 58 M.L.J. 1 (P.C.): 56 I.A. 372: 30 L.W. 619: A.I.R. 1929 P.C. 283.

filed by him on the basis that the debt was a pre-partition debt for which even the sons of Kunne Gounder would be liable so long as they do not establish that it is tainted with illegality or immorality, for, the respondent himself has sought for a decree in the suit only against the assets of Kunne Gounder in the hands of his legal representatives and, therefore, it is not open to the respondent to proceed against the interests of Kunne Gounder's sons in the joint family properties. It is not possible to hold that the partition under Exhibit A-1 is not *bona fide* merely because the appellants have been given an absolute right in the properties allotted to the share of Kunne Gounder in case those properties remained unalienated by him during his lifetime, for, under the terms of the partition deed it was open to any creditor of Kunne Gounder to proceed against the properties allotted to his share in the partition and recover any debt due from him in his lifetime.

8. As mentioned already, a portion of the house property and the shares in Lakshmi Mills have been put in Schedule 'A' to the partition deed, Exhibit A-1, and allotted to the share of Kunne Gounder. The portion of the house allotted to the share of Kunne Gounder has been put even in Schedule 'E' in which the properties allotted to the share of the appellant in L.P.A. No. 39 of 1976 are mentioned, and it is stated that he should take that portion of the house absolutely on the death of Kunne Gounder. Similarly, the shares in Lakshmi Mills allotted to Kune Gounder have been put even in the Schedules 'J', 'K' and 'L' in which the properties allotted to the share of Kunne Gounder's daughters, the appellants in L.P.A No. 40 of 1976, are mentioned and it is stated there that they should take their shares on the death of Kunne Gounder. In the body of the document it is stated that the properties allotted to each of the parties to the document have been taken by each of them and they have been allotted to each of them to be enjoyed by them absolutely from generation to generation without any claim from any other party to the document. The contention of the learned counsel for the appellants is that all the terms of the document should be read together and an attempt should be made to give effect to every part of the document, if possible, and that if such a course is adopted, what would emerge is that Kunne Gounder had only a life estate in the properties with an option to exercise the power of disposal over the properties during his lifetime and that if he did not exercise that option and had left the properties intact at the time of his death, those properties should be taken absolutely by the appellants in accordance with the terms of the document. The contention is that the appellants have acquired a vested right in the properties on the date of the document and that their right to enjoy the properties in the event of those properties remaining unalienated by Kunne Gounder had been postponed till after the death of Kunne Gounder and, therefore, the properties could not be attached in the hands of the appellants as the assets of Kunne Gounder.

9. The learned counsel for the respondent does not contend that the gift over to the appellants should not be upheld. But his contention is that the appellants got the properties only on the death of their father Kunne Gounder and that they are, therefore, assets of Kunne Gounder in their hands liable to be proceeded in execution of the decree. Thus it is contended that there is no vesting of the properties on the appellants in the lifetime of Kunne Gounder. In this connection it is necessary to bear in mind the provisions of section 19 of the Transfer of Property Act which reads:

> "Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.
>
> A vested interest is not defeated by the death of the transferee before he obtains possession. *Explanation*: An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment hereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person."

It is also necessary to bear in mind the principles governing the construction of documents. The Supreme Court has observed in *Navaneetlal* v. *Gokul*[1] thus:

1. (1976) 1 S.C.C. 630: (1976) 1 A.P.L.J. (S.C.) 47: (1976) 2 S.C.R. 924: A.I.R. 1976 S.C. 794.

"In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed..............

The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

The Court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative... Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator.......

It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect, but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will."

In a much earlier decision in *K. Kumaran* v. *M.J. Mattom*,[1] a Bench of the Kerala High Court has observed:

"The principle has been well settled that the meaning of any particular clause in gifts or wills is to be collected from the entire instrument and all its parts are to be construed with reference to each other. And before a provision is disregarded on the ground of repugnancy to the main provision, every attempt must be made to reconcile, if possible, the two provisions to see whether the main object of the transferor was to make an absolute transfer or only a restricted transfer."

1. A.I.R. 1957 Ker. 119.

In the earlier decision in *Krishna Iyer* v. *Swaminatha Iyer*[1] decided by a Bench of this Court, one Kuppuswami Iyer, the last male owner of the properties in suit and other properties executed a will under which his mother, widow and natural brother were the legatees. Subsequently, there was a compromise decree which secured to two persons rights in certain properties dependent on the death of the testator's mother Seshiammal. One of those two persons alone was alive and Seshiammal died subsequently. The other person contended that as he alone was alive at the time of Seshiammal's death, the heirs of the other person were not entitled to any rights. The learned Judges repelled the contention that the two persons did not take a vested interest in the property and held that the compromise which secured rights to the two persons dependent upon the death of Seshiammal created a vested right and that vested interest under the Indian Law does not pass by survivorship but is inheritable and divisible between the two donees. In *Govindaraja Pillai* v. *Mangalam Pillai*,[2] a Hindu husband settled certain properties on his wife, saying in the settlement deed that the wife should hold and enjoy them "with all rights" and that if she was to die without issue, her brothers should take the properties. Subsequently, in a compromise in a suit between the husband and wife, some of those properties were allotted to the husband absolutely and the rest to the wife. On the death of the wife issue-less, her brothers claimed the properties allotted to the wife in the compromise. But the husband, who had adopted a son after the death of his wife, resisted the claim of his wife's brothers. It has been held by Sundaram Chetty, J., that the moment the wife died without any issue either natural or adopted, the properties devolved on her brothers by reason of the defeasance clause and the gift over to them and that the properties having vested in her brothers on her death, could not be divested by reason of the subsequent adoption made by the husband. In *Swarnamoyee* v. *Probodh Chandra*,[3] one Mondal executed a will in 1868 giving certain Government Promissory Notes to his wife *B*, and on her death to his daughter *D*, who had two sons *K* and *J*, of whom *K* predeceased both *B* and *D*, *B* dying before *D*. It was contended before the

1. (1918) 8 L.W. 140.

2. (1932) 36 L.W. 733: 63 M.L.J. 911: A.I.R. 1933 Mad. 80.

3. A.I.R. 1933 Cal. 253.

Bench of the Calcutta High Court in that case that the whole object of the will was to keep these Government Promissory Notes away from the brother of the testator and his line and that nothing else was done by the will than to leave them to his wife and then to his daughter and thereafter to his daughter's sons as it would be in the case of intestacy. The learned Judges repelled that contention, observing:

> "We think it was his intention to make gifts in *presenti* in their favour, only postponing the enjoyment thereof in the case of the daughter till the death of the widow, and in the case of the grandsons till the lives of the widow and the daughter were over. We have been asked to construe the words used in their natural meaning; it is true that it is not expressly stated in the will that the estate to the widow was for her life or that the estate to the daughter was for her life, and it is also true that so far as the widow and the daughter are concerned the devise apparently is no more restricted in its character than in the case of the grandsons. But taking the whole of the bequest together and giving the words their natural meaning we are driven to the conclusion that what was meant was that it would go to the widow for her life, then to the daughter for her life and thereafter to the grandsons absolutely. In other words the intention was to create an absolute estate in the grandsons with the two life estates intervening, a thing not unknown or repugnant to Hindu law. The will, having regard to its date, is not governed by the Succession Act, but even if the principles of that Act are applied to it, the same result is reached because the interests created are not 'contingent' but 'vested'. The expression 'on her death' must be taken to indicate merely the time when the gift over is to be reduced to possession and not the time when the right to such possession vests. (see *Hallifax* v. *Wilson*[1]. The principle underlying this rule is that no contingency is imported by the fact that a legacy is given after a life-estate in the property bequeathed. As 'nothing is more certain than that every person who lives must die, the death of a life-tenant is an event not contingent but certain.' "

We see the following passage in a decision of the Patna High Court in *Kali Prasad* v. *Ram Golam*[2]:

> "The existence of a power of appointment would not prevent the vesting of the remainder, because where estates are subjected to a general power of appointment in the first taker with remainder over in default of such appointment, the power does not suspend the remainder from vesting."

In *Lakshmi Ammal* v. *Allauddin*[1], one Subbiah Pillai executed a will in 1931 (Exhibit A-1) and died soon afterwards leaving his widow Lakshmi Ammal and two daughters Amirthammal and Ammakutti. The will purported to deal with two items of properties and it gave them to the widow with absolute rights and also provided that after her lifetime item 1 should go to Amirthammal and item 2 to Ammakutti. Amirthammal and Lakshmi Ammal died in 1941 and 1948, respectively. The question for consideration before Ramakrishnan, J., who decided that case, was whether Lakshmi Ammal got an absolute estate or only a limited estate with the vested remainder in the two daughters. The Court had found that the first part of the will granted an absolute estate to the widow and the gift over to the daughter was a repugnant clause and therefore invalid, as has been held in the present case by N. S. Ramaswami, J. But the lower appellate Court, however, decided that the will has to be construed as a whole and if so construed, the subsequent clause had the effect of reducing the interest of Lakshmi Ammal to a life-estate. Ramakrishnan, J., agreed with the lower appellate Court and held that the widow Lakshmi Ammal had only a life-estate. A similar case came up for consideration before Ganesan, J., in *Ramasrenivasa Iyengar* v. *Padmasani Ammal*[2]. In that case the terms of the will were that the property should be taken by the daughters of the testator, *C* and *P*, in equal shares with absolute rights, but the share of the lady without issue shall, after her death, be taken by the lady with issues along with her children. Ganesan, J., has observed in that decision:

> "In deciding the question, the Court has to take into consideration not only the terms of the earlier devise but also other subsequent provisions inconsistent with an absolute gift such as a restriction of alienation or gift over on the donee disposing or failing to dispose of the property..............

1. (1809) 16 Ves Jun 168.
2. A I R. 1937 Pat. 163.

1. (1962) 2 M.L.J. 187: A.I.R. 1962 Mad. 247.
2. (1973) 86 L.W. 456.

On a fair construction of the terms of the will in this case and taking the document as a whole, I am clear that the testator intended by the earlier clause that the two daughters including Chellammal should take only a life-estate if they had no issue and that on the death of the lady without issue the property should be taken absolutely by the surviving daughter with issues".

A clause in a partition arrangement in Tamil came up for interpretation before Ramachandra Iyer, C. J., and Venkatadri, J., in *Ramaswami Chettiar* v. *Venkatammal*,[1] in a Letters Patent appeal which arose from the judgment of Veeraswami, J., as he then was, and when freely translated read thus:

"We have agreed that the properties set out in Schedule 'A' hereto, worth Rs. 3,500 should be enjoyed by No 1 (Alagarsami Chettiar), with a right to create mortgages, othis and waram leases but with no power of sale or gift; that if, beyond creating mortgages, othis and waram leases, party No. 1 (Alagarswami Chettiar) were to execute sales or gifts, such sales or gifts will not be valid. If No. 1 were to marry again and by that marriage he gets other heirs, those heirs alone shall take the 'A' Schedule properties after his lifetime and after performing his obsequies; the heirs born of the second wife shall discharge the debts contracted by No. 1 of us and enjoy the properties absolutely. If No. 1 of us were to marry again but does not get a male heir, the second of us, that is Subbiah, shall, after the lifetime of the first, perform his obsequies and he shall take the 'A' Schedule properties with absolute rights. If No. 1 were to borrow, the second of us shall discharge those debts."

It was contended before the learned Judges that on the terms of the document (Exhibit A-1 in that case) an absolute estate on Alagarsami Chettiar must be implied and that what remained with Alagarsami must be regarded as his absolute property and the restrictions placed upon it should not be held to be binding upon him.

The learned Judges observed:

"We are, however, unable to agree that there will be a distinction in the matter of construction between a partition deed and other documents *inter vivos* or by way of a testamentary disposition. In both the cases the extent of rights obtained by a party should be determined on a true construction of the document. It is true that in an ordinary partition deed, there would be no occasion for providing for the destination of the property after the lifetime of the sharers. But a partition deed, sometimes may take the form of a family arrangement, whereunder benefits might be conferred not merely on the immediate parties to the partition, but on other persons as well. In the instant case, having regard to the surrounding circumstances and the express language employed in the document, the arrangement that was entered into between Alagarsami Chettiar and his son was of a two-fold character, namely, a partition and a settlement. Alagarsami Chettiar was old, and it was, perhaps, thought that it would be wiser, even at the time of the partition to provide for the devolution of the properties in accordance with the arrangement thereby conferring benefit on any son that Alagarswami Chettiar might have through the contemplated second marriage. The gift over to the second wife's son, and failing him, to Subbiah, does indicate that Alagarsami Chettiar was to take only a life estate. The further provision denying him the power of sale or gift, confirms this interpretation. Except the fact that a power to raise a loan on mortgage or to grant leases, has been given, there is no other indication in the document to show that Alagarsami Chettiar was to have an absolute estate in the property. At one stage of the arguments, learned counsel contended that the provision for the destination of the remainder, should be regarded as invalid, being repugnant to the absolute estate inhering in Alagarsami Chettiar. It is an accepted rule of construction that a document should be read as a whole and an effort should be made to give effect to every part of it. Applying that principle, Exhibtt A-1, can be read as conferring nothing more than a life estate with certain powers on Alagarsami Chettiar, the remainder being given to the male issues of the second wife and failing them to Subbiah...............

We are of opinion that the nature of the estate granted to Subbiah has to be decided on a consideration of all the clauses in the partition document and not merely by the sequence of the dispositions ....

1. (1964) 77 L.W. 691: I.L.R. (1965) 1 Mad. 41: A.I.R. 1965 Mad. 193.

The construction of the partition deed can be made in one of the three following ways: (*i*) whether it intends a present gift of the remainder in the property allotted to Alagarsami, to Subbiah merely postponing the enjoyment till after his lifetime; or (*ii*) the present gift of that remainder is made to Subbiah, the right to enjoy which being postponed after the lifetime of his father and which gift is liable to be defeated on a son being born out of the contemplated second marriage; or (*iii*) whether there is no present gift of the remainder at all in favour of Subbiah, the gift of the remainder only taking place after it is found that there could be no son by the second marriage.

It is a cardinal rule of interpretation of documents that effect should be given to the expressed intentions of the testator, which have to be gathered on a reading of the entire document. It can also be stated as a well-recognised principle that even when the bequest is dependent upon a contingency, it will not necessarily prevent vesting of the estate till that contingency happens....

Applying that principle, we are of opinion that it would not have been the intention of the parties to the partition deed to impose a condition for the vesting of the remainder, the non-performance of which should work a forfeiture of the property. It is a prevalent idea, in the community to which the parties belong, that the person who takes the property of a deceased will have the duty of performing his obsequies. The performance of the ceremonies must, therefore, have been regarded as incidental to the taking of the property and not as a condition precedent to it. There being, therefore, no condition for the vesting of the property in Subbiah, the interest obtained by him should be regarded as one which vested in him the moment the partition deed was executed, and such interest could be inherited by his mother Venkatammal on his death."

The terms of a will (Exhibit A-3) which came up for consideration before Ramamurti, J., in *Jabamalai Mariammal* v. *Madalaimuthu Thevar*[1] provided that after the lifetime of the testatrix the properties were bequeathed to her husband *A* who should take it as absolute owner and enjoy with full rights of alienation by gift or otherwise and after *A*'s death, their son *B* shall become the absolute owner, etc. The question for consideration was whether the will should be construed as creating an absolute estate in favour of *A* following a repugnant clause which should be held to be void, or whether on a construction of all the clauses together it should be held that there is no life-estate in favour of *A* and the later bequest in favour of *B* is not a repugnant provision but is an independent bequest to take effect on the death of *A*. Ramamurti, J., has observed:

"As the judicial decisions reveal, difficulty has been frequently experienced by Courts in determining the effect of the later and subsequent clauses of the will, engrafting an executory devise or a 'gift over' in favour of other persons on happening of a contingency, *i.e.*, whether the latter clause should be ignored as void, being repugnant to the former clause, being an attempt to lay down a rule of devolution, when the property has already been taken absolutely by some one else, or whether the latter clause should be construed as one by way of defeasance falling under the recognised clauses or whether the later clause on a proper interpretation, must be held to cut down the absolute estate conferred under the former clause, with a view that the intentions of the testator clearly manifested in the will could be effectuated. The problem always has been to decide on which side of the border line the later clause should fall."

Ramamurti, J., extracted in his judgment the following observation of the Supreme Court in its judgment in *Ramachandra* v. *Hilda Brite*:[1]

"It is for this reason that where there is a bequest to *A* even though it be in terms apparently absolute followed by a gift of the same to *D* absolutely 'on' or 'after' or 'at' *A*'s death, *A* is *prima facie* held to take a life interest and *B* an interest in remainder, the apparently absolute interest of *A* being cut down to accommodate the interest created in favour of *B*. In the present case if, as has to be admitted, the testatrix did intend to confer an absolute interest on the male children of Saverina the question is whether effect can or cannot be given to it. If the interest of Saverina were to be held to be absolute no doubt effect could

1. (1966) 79 L.W. 141.

1. (1964) 2 S.C.R. 722: A.I.R. 1964 S.C. 1323.

not be given to the said intention. But if there are words in the will which on a reasonable construction would denote that the interest of Saverina was not intended to be absolute but was limited to her life only it would be proper for the Court to adopt such a construction, for that would give effect to every testamentary disposition contained in the will. It is in that context that the words 'after her lifetime' occurring in clause 3 (*c*) assumes crucial importance."

Ramamurti, J., has observed in his judgment:

"I am unable to consider this decision and regard these observations of the Supreme Court as an authority for the proposition in an unqualified form that in every case in which an absolute estate is followed by a bequest on or after or at death of the prior legatee the latter bequest would have the effect of cutting down the former absolute estate into a life estate without powers of alienation. There is nothing in the decision which supports the view that where the first legatee is conferred in express unambiguous language, powers of alienation, the alienation could be declared to be invalid by reason of a later clause either by way of defeasance or by way of a gift over. As observed earlier, cases of that kind stand on an entirely different footing governed by different principles altogether. The decision of the Supreme Court turned upon the particular language and features of the will in question....I am therefore of opinion that this decision does not support the extreme contention put forward by learned counsel for the respondent. Reading all the clauses of the will in Exhibit A-3, I am of the opinion that the intention of the testatrix is to maintain the absolute estate in favour of her husband. The words 'with all powers of alienation' are words of widest amplitude. The subsequent bequest in favour of the son would take effect only if the husband died without alienating the property. But if he had alienated, the validity of the alienation must be upheld in view of the express terms of the will as otherwise the intention of the testatrix would be frustrated ....I am inclined to take the view that this provision of the gift over in favour of the son has been made by the testatrix not with a view to cut down the absolute estate but merely as a contingent provision that in case the husband should die without alienating the property it should be taken by the son."

10. It would follow from the decisions referred to above that the partition deed, Exhibit A-I, in this case has to be read as a whole to gather the intention of the parties.

11. The clause conferring an absolute interest on Kunne Gounder in respect of the properties allotted to his share in the partition should not be read in isolation and the clause in the deed which provides for the appellants taking the house portion and the shares in Lakshmi Mills as the case may be, on the death of Kunne Gounder should not be regarded as repugnant and void. An attempt must be made to reconcile every part of the document and if such a course is adopted, it would be clear that Kunne Gounder had no doubt an absolute right in the properties allotted to his share in the partition deed and could dispose of those properties during his lifetime and that if those properties remained unalienated by him during his lifetime, the appellant in L.P.A. No. 39 of 1976 should take the portion of the house allotted to the share of his father absolutely and the appellants in L.P.A. No. 40 of 1976 should take absolutely the shares in Lakshmi Mills allotted to the share of their father in the partition deed. If such a construction is not attempted, there would be the consequence of ignoring the clear intention of the parties as expressed by them by putting these properties in Schedule 'A' and saying clearly that those properties shall, on the death of Kunne Gounder, be taken by the appellants herein, and also by putting those properties in Schedules 'A', 'J', 'K' and 'L' and saying in those Schedules that the appellants herein, shall take those properties on the death of Kunne Gounder. The rights which the appellants acquired by the aforesaid clauses ln the partition deed are vested rights and not contingent rights, as the death of Kunne Gounder was an event which was certain to happen, whereupon the appellants herein became entitled to actual possession of the properties.

12. The learned counsel for the respondent relied upon a decision of a Bench of this Court in *Pugalumperumal Pillai v. Thangathammal*[1] where the learaned Judges have observed:

"As observed by their Lordships of the Privy Council in *Lalit Mohan Singh Roy v. Chukkun Lal Roy*,[2] there are two cardinal principles

1. (1949) 62 L.W. 260: (1949) 1 M.L.J. 389: A.I.R. 1949 Mad. 690.

2. I.L.R. (1897): 24 Cal. 834: 24 I.A. 76: 1 Cal. W.N. 387(P.C.).

in the construction of wills, deeds and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words, or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense............

Relying upon the decision in *Subbamma v Ramanaidu*[1], it is argued that there is a donation in this case to Veeraperumal Ammal with a gift over to her issue and such being the case the whole document should be given effect to which can be done only by construing the gift as a life estate. No doubt Varadachariar, J., in construing the will, the subject-matter of the dispute in that case was of opinion that in order to avoid the possibility of not giving effect to certain portions of the will, the proper rule of construction has been to take the will as a whole; and the presence of a gift over, which is not a mere gift by way of defeasance, was held to be an indication that the prior gift was only a limited estate. Special circumstances which were present in that will, also led the learned Judge to come to that conclusion. Having considered that case carefully, we are of opinion that the observations therein do not afford much assistance for the construction of Exhibit P-7 where, as stated already, there are clear and unambiguous words denoting the grant of an absolute estate in favour of Veeraperumal Ammal."

The learned Judges thus agreed with Rajamannar, J., as he then was, whose judgment they were considering in a Letters Patent appeal. The observations made in that decision have to be held to be applicable to the facts of the particular case and the nature of the gift deed which came up for the learned Judges' consideration in that case, read thus:

"As I have given away to you the property in the schedule herein worth Rs. 1,500 as *stridhanam* gift you shall hold and enjoy the aforesaid property and so on as long as the sun and moon last. After your lifetime your issues if there are any, shall get the aforesaid property. If you have no male or female issues, the aforesaid property shall revert to me and to my male heirs. I shall, till my lifetime, reside jointly with you in the thatched house mentioned in the schedule."

The other decision relied upon by the learned counsel for the respondent is of Somasundaram, J., in *Ratnaswami Pillai* v. *Kathija Bivi Ammal.*[1] There a Hindu testator bequeathed his properties to his daughter stating that "my daughter shall get these properties after my lifetime with absolute rights" and she shall not alienate the property except for the discharge of debts and after her lifetime her grandsons should get the properties. Following the aforesaid decision in *Pugalumperumal Pillai* v. *Thangathammal,*[2] it has been held by Somasundaram, J., that the subsequent restrictive clause is repugnant and therefore invalid, and it is at best a provision for devolution of the property after her death and it is not intended to limit the character of the estate given by the earlier bequest in favour of the daughter. This decision will not, in our opinion, apply to the facts of the present case where the properties concerned have been put in Schedule 'A' relating to Kunne Gounder with a clause that on his death the house portion shall be taken absolutely by the appellant in L.P.A. No. 39 of 1976 and the shares in Lakshmi Mills shall be taken absolutely by the appellants in L.P.A. No. 40 of 1976 and those properties have been put accordingly even in Schedules 'E', 'J', 'K' and 'L' with a recital that the appellants shall take those properties absolutely on the death of Kunne Gounder.

13. On a careful consideration of the terms of the partition deed in this case and the principles laid down in the decisions referred to above, we are of the opinion that the entire document, Exhibit A-1, has to be read as a whole and attempt should be made to reconcile every part of the document with what is stated in the other parts of the document and that, if such a course is adopted, what would follow is that Kunne Gounder had a life estate in the properties with full power of alienation over the properties during his lifetime and that in the event of Kunne Gounder not exercising that power of alienation, as it turned out to be, those properties shall be taken on his death absolutely by the appellants in these two appeals and that this right which the appellants got under the document is a vested right and

1. (1937) 45 L.W. 153: (1937) 1 M.L.J. 268: A.I.R. 1937 Mad. 476.

1. (1950) 63 L.W. 963.
2. (1949) 1 M.L.J. 389: (1949) 62 L.W. 260.

not a contingent one, and therefore the properties were not the assets of Kunne Gounder in the hands of the appellants and could not be attached in the execution of the decree which the respondent has obtained against the assets, if any, of Kunne Gounder in the hands of his children. With respect, we are unable to agree with N.S. Ramaswami, J., that the clause in the partition deed that appellants should take the properties absolutely on the death of Kunne Gounder is repugnant and void.

14. The result is that the appellants succeed and these Letters Patent Appeals are allowed with costs throughout. Advocate's fee one set.

R.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Noohu Pathuammal and others .. *Appellants**

v.

Ummathu Ameena and others .. *Respondents.*

Mahamedan Law—Gift of immovable property, by husband to wife—Delivery of possession not necessary.

Civil Procedure Code (V of 1908), Order 32, rule 7 —Minors party to compromise—Appointment of legal guardian as guardian ad-litem*—Effect—Leave of Court not obtained—Compromise whether valid and binding—Civil Procedure Code over-rides personal law.*

In the case of gift of immovable property by husband to wife no physical departure or formal entry is required, whether the property is used by the husband and wife for their joint residence, or is let out to tenants. The fact that the husband continued to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the residence was on account of matrimonial obligation and that the rents are collected by the husband on behalf of the wife and not on his own behalf. Nor is mutation necessary if the deed of gift declares that the husband delivered possession to the wife and the deed is handed over to her and retained by her. Similarly in the case of a gift to a minor child by a father, no delivery of possession is required and all that is necessary is to establish a *bona fide* intention to give.

The rules relating to the appointment of guardian *pendente lite* for a minor defendant are to be found in Order 32 of the Code of Civil Procedure. There is nothing in the said provisions making it mandatory on the Court to appoint the natural guardian, even where he expresses his willingness, and not exercise its discretion if it considers fit, and appoint another person as guardian *ad-litem* for the suit. The essential requirements are that the person who is appointed as the guardian must be a major, of sound mind and must have no interest adverse to that of the minor. The rules under Order 32 of the Code clearly contemplate the possibility of appointment of a person, other than the natural guardian, as guardian *ad-litem.* [*Para.* 11.]

The provisions of Order 32 are applied irrespective of the personal law of the parties. It is a part of the law of procedure which regulates all matters going to the remedy, and when the matter passes into the domain of procedure, it must be regulated by the law governing the action in the Court. When a legal guardian is appointed guardian *ad-litem,* the actions of such guardian will be controlled not by the personal law of the parties but by the Civil Procedure Code. The Civil Procedure Code in so far as the matter relates to proceedings before the Court over-rides the personal law.

Held: That the settlement of a disputed claim in a *bona fide* litigation is itself a consideration passing from one side to the other and the compromise would, therefore, be supported by consideration.

Cases referred to:—

Kaushalya Devi v. *Baijnath Sayal,* (1961) 3 S.C.R 769: (1962) I S.C.J. 684: A.I.R. 1961 S.C 790; *Mohd. Amin* v. *Vakil Ahmed,* 1952 S.C.R. 1133: 1952 S.C.J. 539: (1953) I M.L.J. 6: 66 L.W. 3: A.I.R. 1952 S.C. 358; *Imambandi* v. *Mutsaddi,* (1918) 45 I.A. 73: 9 L.W. 518: 35 M.L.J. 422: A.I.R. 1918 P.C. 11; *Syed Shah Gulam Ghouse Mohiuddin* v. *Syed Shah Ahmad,* (1971) 3 S.C.R. 734: A.I.R. 1971 S.C. 2184; *Kumara Kangaya Gounder* v. *Arumugha Gounder,* (1970) I M.L.J. 286: 83 L.W. 322: A.I.R. 1970 Mad. 179; *Mohammad Sulaiman* v. *Mohd. Ismail,* (1966) 1 S.C.R. 937: A.I.R. 1966 S.C. 792; *Bhikaji Ramchandra Shimpi* v. *Ajagarally Sarafally Bohari,* A.I.R. 1946 Bom. 57; *Baby Gyanu* v. *Mohd. Sardar,* A.I.R. 1955

*A. No. 439 of 1973. *3rd January,* 1978.

Nag. 193; *Ganesh Row* v. *Tuljaram Row*, (1913) 40 I.A. 132: I.L.R. 36 Mad. 295: 25 M.L.J. 150; *Gulam Ghouse* v. *S. S. A. M. Kamisul*, (1971) 3 S.C.R. 734: A.I.R. 1971 S.C. 2184; *Maqboolan* v. *Habib Ullah*, (1927) 102 I.C. 470: A.I.R. 1927 Oudh 222; *Durga Charan* v. *Akkari Das*, A.I.R. 1949 Cal. 617; *Chidambaram* v. *Subramaniam*, (1952) 2 M.L.J. 524: 65 L.W. 980: A.I.R. 1953 Mad. 492; *Rameshar Mistri* v. *Babulal Pandit*, A.I.R. 1946 Pat. 97.

Appeal against the decree of the Court of the Subordinate Judge, Padmanabhapuram, dated 24th April, 1972 and passed in O.S. No. 17 of 1970.

S. M. Amjad Nainar and *A. S. Hussan*, for Appellants.

Habibulla Badsha, E. S. Govindan, A. S. Chandrasekaran, Sreekumaran Nair, S. Padmanabhan and *P. Ananthakrishnan Nair*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs in O. S. No. 17 of 1970 in the Court of the Subordinate Judge of Padmanabhapuram are the appellants. There was one A. P. Mohammed Noohu, who carried on extensive business in Ceylon and acquired properties in India as well as Ceylon during his lifetime. He died on 1st April, 1959. On 30th May, 1956, prior to his undertaking the Haj pilgrimage, he executed a number of settlements in respect of the properties covered by 'A' Schedule to the plaint in favour of his wives and children. He had married two wives. The first plaintiff is the Indian wife and the first defendant is the Ceylon wife. He has seven children by his Indian wife, who was also the first wife, and he has six children by his Ceylonese second wife. It is in favour of these two wives and children that the settlement deeds were executed on 30th May, 1956.

2. After Mohammed Noohu died on 1st April, 1959, the plaintiffs filed a suit O.S. No. 9 of 1964 in the Court of the Subordinate Judge of Padmanabhapuram, which was later transferred to the Sub-Court Nagercoil and numbered as O.S. No. 24 of 1965. That was a suit for partition of all the properties including those settled under the document, dated 30th May, 1956, in favour of the defendants. One of the contentions was that those settlements were invalid. Defendants 1 to 7 and others filed a suit O.S. No. 17 of 1964 in the same Sub-Court, Padmanabhapuram, which was also transferred to the Sub-Court, Nagercoil, and was numbered as O.S. No. 25 of 1965. The prayer was for administration of the estate and for accounts among other reliefs. O.S. No. 24 of 1965 was compromised and a decree in terms of the compromise was passed on 17th March, 1966. O.S. No. 25 of 1966 was dismissed on 24th March, 1969, on the ground that no suit for administration of the estate of a deceased Mohamedan lay. In pursuance of the compromise in O.S. No. 24 of 1965 certain other proceedings under section 145 of the Criminal Procedure Code were disposed of. One of the terms of the compromise of O.S. No. 24 of 1965 was that the parties shall be in possession of the properties described in the schedule to the plaint in the said suit till the title to the said properties was settled after discussion between the first plaintiff on the one hand and defendants 1 to 7 on the other, in that case, and that such settlement shall be arrived at within a period of three years from that date, that is, 7th May, 1966. If no such settlement was arrived at by that time, the plaintiffs and the 8th defendant were to be entitled to the half of items 1 to 17 and the other half should belong to defendants 1 to 7. There was no such settlement arrived at between the first plaintiff and defendants 1 to 7 within the period of three years as contemplated by the said compromise decree, marked as Exhibit A-3 in the present case.

3. The plaintiffs came forward with the present suit for a permanent injunction restraining defendants 9 to 19 from disturbing their possession of the plaint A and B Schdule properties and restraining defendants 1 to 8 from alienating the plaint 'A' and 'B' Schedule properties and for partition of their half share in the 'A' Schedule properties by metes and bounds. The allegations in the plaint were that the deeds of settlement executed by Mohamed Noohu on 30th May, 1956, in favour of the defendants were sham or nominal and, in any event, invalid deeds, that the plaintiffs and the 8th defendant were in joint possession of the 'A' Schedule properties as co-owners in accordance with the terms of the compromise and that there should be a division by metes and bounds of the said properties. The alienations made by the defendants were questioned.

4. This suit was contested by the defendants contending that the settlement deeds were valid and effective, that the compromise on the basis of which the present suit for partition has been filed was itself void, as there were

minors, for whom there was no lawful guardian so as to represent their interests in the said litigation and that the plaintiffs were not entitled to challenge any alienation. The issues mainly related to the validity of the settlements and the compromise.

5. The learned Subordinate Judge held that the compromise was not enforceable, that the settlement deeds were valid and that the plaintiffs were not entitled to the reliefs claimed. The plaintiffs have, therefore, come forward with the present appeal contesting the findings of the Court below.

6. In the present case also the same two points, *viz*., (*i*) whether the settlements in favour of the defendants on 30th May, 1956, were valid and effectual, and (*ii*) whether the compromise is binding on all or any of the defendants arise for consideration. The settlement or gift deeds in question are in favour of the first defendant and her children. These gifts were challenged only on the ground that there was no delivery of possession. The learned Subordinate Judge has held that the gifts or settlements were valid. The law is clear on this point. In the case of gift of immovable property no physical departure or formal entry is required, whether the property is used by the husband and wife for their joint residence, or is let out to tenants. The fact that the husband continued to live in the house or to receive the rents after the date of the gift, will not invalidate the gift, the presumption in such a case being that the residence was on account of matrimonial obligation and that the rents are collected by the husband on behalf of the wife and not on his own account. It has also been held that no mutation of names is necessary if the deed of gift declares that the husband delivered possession to the wife and the deed is handed over to her and retained by her. See Mulla's Principles of Mohamedan Law, eighteenth edition, paragraph 153. Similarly in the case of a gift to a minor child by the father no delivery of possesion is required and all that is necessary is to establish a *bona fide* intention to give. See paragraph 155 of Mulla's Principles of Mohamedan Law. In view of the settled legal position, Mr. Parasaran, the learned counsel for the appellants, was not in a position to contend that the settlement deeds were invalid or ineffective because of the absence of any physical transfer of possession. It is rather curious to find that the plaintiffs questioned the gifts in favour of the defendants while the gifts in their favour were not considered to be bad and the properties covered by them have not been brought into the hotchpot for the purpose of division, though the facts in all cases of the settlements were identical. The plaintiffs cannot have it both ways. The Court below rightly held that the gifts in favour of the defendants 1 to 7 are valid.

7. I shall now deal with the question of the validity of the compromise. Even though the gifts may be valid, still in so far as they were covered by the compromise decree, the contention of the appellants is that the compromise substitutes the rights of parties to the respective properties. It may be made clear here that as fara s 'B' Schedule properties are concerned, the learned counsel was not in a position to contend that they were, in any way, affected by the compromise. As far as 'B' Schedule properties are concerned, the appellants will not be entitled to any relief of partition or the other reliefs as prayed. As regards the 'A' Schedule properties, the finding of the Court below was that the compromise itself was invalid and illegal, because defendants 2 to 7 were minors, and the leave of the Court had not been obtained for effecting the compromise on their behalf. It has also been found by the learned trial Judge that the compromise was not supported by consideration. The main contention of the learned counsel for the appellants was that the compromise was fully supported by consideration and that the omission to obtain the leave of the Court under Order 32, rule 7, Civil Procedure Code, did not render the compromise a nullity in its entirety. In the submission of the learned counsel the compromise could be enforced as against the majors. I shall, therefore, first consider the question whether the compromise fails in its entirety for want of leave of the Court under Order 32, rule 7, Civil Procedure Code, which runs as follows:

> "7. (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.
>
> (2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

The Supreme Court considered this provision in *Kaushalya Devi and others* v. *Baijnath Sayal (deceased) and others*[1]. That appeal arose out of a suit filed by Baij Nath, against his other coparceners for a partition of the family properties. By consent of parties, a preliminary decree was drawn by the trial Court on 30th October, 1941. This preliminary decree was successfully challenged on appeal with the result that it was set aside and the case was remanded for trial. After remand, the parties again came together and by consent requested the Court to pass a preliminary decree once again on 15th October, 1943. This preliminary decree specified the shares of the respective parties and left three outstanding issues to be determined by one of the defendants, who was to be appointed Commissioner for that purpose. The Commissioner submitted his report and ultimately, after hearing the objections, a final decree was drawn up on 21st June, 1944. It was against this final decree that an appeal was filed and it was urged on behalf of the appellants that the preliminary decree was invalid in that, at the time of passing it, the Court had failed to comply with the mandatory provisions of Order 32, rule 7 of the Code of Civil Procedure. The High Court did not allow this plea to be raised, as there was no appeal against the preliminary decree. In the further appeal to the Supreme Court, the legal position with reference to Order 32, rule 7 was enunciated as follows:

> "The effect of the failure to comply with Order 32, rule 7 (1) is specifically provided by Order 32, rule 7 (2) which says that any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor. Mr. Jha reads this provision as meaning that the impugned agreement is voidable against the parties to it who are major and is void in respect of the minor; in other words, he contends that the effect of this provision is that the major parties to it can avoid it and the minor need not avoid it at all because it is a nullity so far as he is concerned. In our opinion this contention is clearly inconsistent with the plain meaning of the Rule. What the Rule really means is that the impugned agreement can be avoided by the minor against the parties who are majors and that it cannot be avoided by the parties who are majors against the minor. It is voidable and not void. It is voidable at the instance of the minor and not at the instance of any other party. It is voidable against the parties that are majors but not against a minor. This provision has been made for the protection of minors, and it means nothing more than this that the failure to comply with the requirements of Order 32, rule 7 (1) will entitle a minor to avoid the agreement and its consequences. If he avoids the said agreement it would be set aside but in no case can the infirmity in the agreement be used by other parties for the purpose of avoiding it in their own interest. The protection of the minor's interest requires that he should be given liberty to avoid it. No such consideration arises in respect of the other parties to the agreement and they can make no grievance or complaint against the agreement on the ground that it has not complied with Order 32, rule 7 (1). The non-observance of the condition laid down by rule 1 does not make the agreement or decree void for it does not affect the jurisdiction of the Court at all. The non-observance of the said condition makes the agreement or decree only voidable at the instance of the minor. That, in our opinion, is the effect of the provision of Order 32, rule 7 (1) and (2)."

Again at page 793 their Lordships emphasised that the words used in Order 32, rule 7 (2) were plain and unambiguous and that they did not lend any support to the argument that non-compliance with Order 32, rule 7 (1) would make the impugned decree a nullity.

8. Mr. Habibullah Badsha appearing for the respondents relied strongly on two other decisions of the Supreme Court in support of his contention that the compromise decree was a nullity. The first decision is reported as *Mohd. Amin and others* v. *Vakil Ahmed and others*[1]. In that case one Abdur Rahman died on 26th January, 1940, leaving a large estate and a number of children. Soon after his death there were some disputes about the legitimacy of some of his children. There was also a dispute as regards the existence of an oral will bequeathing 1/3rd share of his estate to certain persons. Under these circumstances a family settlement was executed on 5th April, 1940. One of the parties was a minor, aged about 9 years and his elder brother purported to represent him as his guardian. On 25th

1. (1962) 1 S.C.J. 684: (1961) 3 S.C.R. 769: A.I.R. 1961 S.C. 790.

1. 1952 S.C.R. 1133: 1952 S.C.J. 539: (1953) 1 M.L.J. 6: 66 L.W. 3: A.I.R. 1952 S.C. 358.

November, 1940, a suit was filed for a declaration that the deed of settlement dated 5th April, 1940, was invalid and for other reliefs. The question was whether the family settlement would bind all the parties. It was held that the minor's brother had no power to transfer any right or interest in the immovable property of the minor, and that such a transfer if made was void. At page 1141 it was pointed out that if the deed of settlement was thus void it could not be void only *qua* the minor plaintiff but would be void altogether *qua* all the parties including those who were *sui juris*. That was a case of the parties executing a deed of settlement among themselves. The settlement was in the nature of a contract. Under Mahomedan Law, during the father's lifetime he is the legal guardian of his minor children, though the mother has rights as to their custody; after his death, his executor (in Sunni Law) is their legal guardian, or, if there is no executor, their grandfather, or if he be dead, his executor. In the absence of any legal guardian the duty of appointing one devolves upon the Judge as representing the Sovereign. See *Imambandi and others* v. *Mutsaddi and others*[1] and *Syed Shah Gulam Ghouse Mohiuddin and others* v. *Syed Shah Ahmad Mohiuddin Kamisul Qadri*[2]. The former was a case where a mother purported to convey the shares of herself and her minor children in the property inherited from the father or the husband as the case may be. The contract was held to be void. The significant fact to be noticed in that case is that it was a contract between the parties and not a compromise to which the provisions of Order 32, rule 7 were applicable.

9. In the latter case on the death of one Abdul Rahim his sons entered into two agreements in 1908 and appointed arbitrators to partition the properties left by him. There was an award which was also made a decree of Court on 13th August, 1908. The suit, which gave rise to an appeal to the Supreme Court, was instituted on 24th July, 1941, for setting aside the decree confirming the award and for partitioning the property. This suit was dismissed. But later on, on a remand, the decree confirming the award was set aside. In the appeal before the Supreme Court it was contended that the award was void by reason of lack of lawful guardian to protect and represent the rights and interests of the minor in the arbitration proceedings and in the proceedings resulting in the decree upon the award. In dealing with this aspect the Supreme Court observed at page 2187 as follows:

> "The minority of the appellant is a fact found both by the trial Court and the High Court. It is an admitted fact that the appellant's guardian was his brother Nooruddin at the time of the arbitration proceedings and at the time of the decree on the award. The brother is not a lawful guardian under the Mohammadan Law. The legal guardians are the father, the executor appointed by the father's will, the father's father and the executor appointed by the will of the father's father. No other relation is entitled to the guardianship of the property of a minor as of right .... In default of legal guardians a duty of appointing guardian for the protection and preservation of the minor's property is of the Court on proper application. It was held by this Court in *Mohd. Amin* v. *Vakil Ahmed*[1], relying on the dictum in *Imambandi* v. *Mutsaddi*[2], that where disputes arose relating to succession to the estate of a deceased, the eldest son acting as guardian for and on behalf of the minor son, the deed was not binding on the minor son as his brother was not his legal guardian; and the deed was void not only *qua* the minor, but with regard to all the parties including those who were *sui juris*. It is clear on the authority of this decision that the arbitration agreement and the award and the decree are all void in the present case by reason of lack of legal guardian of the appellant."

10. Two aspects have to be noticed in regard to this decision, *viz*., (*i*) there was no appointment of any guardian *ad litem* and (*ii*) the Court had no occasion to go into the question in the light of Order 32 of the Code of Civil Procedure.

11. In the present case it was not in dispute that the first defendant had been appointed as guardian *ad litem* for the minors. The second defendant was the second plaintiff in that case

1. L.R. (1918) 45 I.A. 73: 9 L.W. 518: 35 M.L.J 422: A.I.R. 1918 P.C. 11.

2. (1971) 3 S.C.R. 734: A.I.R. 1971 S.C. 2184.

1. 1952 S.C.J. 539: (1953) 1 M.L.J. 6: 1952 S.C.R. 1133: A.I.R. 1952 S.C. 358.

2. 1918 L.R. 45 I.A 73: 9 L.W. 518: 35 M.L.J. 422: A.I.R. 1918 P.C. 11.

and he was declared major. The rules relating to the appointment of guardian *pendente lite* for a minor defendant are to be found in Order 32 of the Code of Civil Procedure. There is nothing in the said provisions making it mandatory on the Court to appoint the natural guardian, even where he expresses his willingness, and not exercise its discretion, if it considers fit, and appoint another person as guardian *ad-litem* for the suit. The essential requirements are that the person who is appointed as the guardian must be a major, of sound mind and must have no interest adverse to that of the minor. The Rules under Order 32 of the Code clearly contemplate the possibility of appointment of a person, other than the natural guardian, as guardian *ad litem*. See *Kumara Kangaya Gounder* v. *Arumugha Gounder and others*[1]. That was a case which arose between two Hindus. That fact does not make any difference, as the provisions of Order 32 are applied irrespective of the personal law of the parties. It is a part of the law of procedure which regulates all matters going to the remedy, and when the matter passes into the domain of procedure, it must be regulated by the law governing the action in the Court. This principle was applied by the Supreme Court in *Mohammad Sulaiman* v. *Mohammad Ismail and others*[2], in a casewhere a decree had been obtained against three widows and a daughter of the deceased. The decree-holder proceeded *bona fide* on the basis that they were the only heirs of the deceased. Later on the son filed a suit claiming that he was not bound by the previous decree, because he was not a party to the said proceedings. It was held that whether a decree obtained by a creditor against heirs of a deceased Muslim, was binding upon the entire estate or only on those who were impleaded *co-nominee* was not a question to be determined by the personal law either of the deceased or of the defendant in the suit and that it was a part of the law of procedure which regulated all matters going to the remedy.

12. There are, in fact, direct decisions on this question as to how far procedure law takes precedence over the personal law in a matter like this. In *Bhikaji Ramchandra Shimpi v. Ajagarally Sarafally Bohori and others*[3], the plaintiff filed a suit to recover vacant possession of a land purchased by him from a Mahomedan widow and her minor daughter. The widow of one Abdul Rahman declined to be the guardian *ad litem* in certain darkhast proceedings, which arose in execution of a mortgage decree obtained against the widow and the minor daughter. The Court Nazir had been appointed as the guardian *ad litem*. However, later on she applied to the Court agreeing to the appointment of herself as the guardian *ad litem*. She had agreed to sell the mortgaged land to the plaintiff for a sum of Rs. 25,000. She applied also for permission under Order 32, rule 7, to effect the compromise. The application was granted and a sale deed was executed by her for herself and as guardian of the minor child. Thereafter the purchaser-plaintiff filed a suit for recovery of possession from the lessees. It was contended for the lessees that the sale deed was void and not merely voidable. This contention was accepted as the mother was not a guardian under Mahomedan Law. This decision was noticed and not followed by the Nagpur High Court in *Baby Gyanu v. Mohammed Sardar and others*[1]. In that case one Karim was indebted to three creditors, who had obtained a decree against his heirs after his death. His properties were attached. One of the decree-holders undertook to pay off the debts due under the three decrees against Karim. Permission to sell the property was sought from the Collector before whom execution proceedings came. The Collector gave the permission and the widow of Karim sold the property for herself and on behalf of her minor children. The minor children came forward with a suit claiming that their mother had no right to sell the property to bind their interest. A learned Judge of the Nagpur High Court, following the decision of the Bombay High Court cited above, upheld the minors' contention. The Bench consisting of Sinha, C.J. and Hidayatullah, J., on appeal, were of the opinion that as guardian *ad litem* the widow enjoyed powers which any stranger would in such a position and that the disability arising from Mohamedan Law did not affect her, provided, of course, she obtained proper sanction from the Court. It was held that the Collector was competent to give such sanction and that the sale was valid. In coming to this conclusion the learned Judges relied on an earlier decision of the Privy Council in *Ganesh Rao* v. *Tuljaram Row*[2] where in a suit for partition the father was the guardian *ad litem* of his minor son. He had purported to act as father and manager even after such an appointment.

1. (1970) 1 M.L.J 286: 83 L.W. 322: A.I.R. 1970 Mad. 179.
2. (1966) 1 S.C.R. 937: A.I.R. 1966 S.C. 792.
3. A.I.R. 1946 Bom. 57.

1. A.I.R. 1955 Nag. 193.
2. L.R. (1930) 40 I.A. 132: I.L.R. 35 Mad. 295: 2 M.L.J. 150.

Their Lordships of the Privy Council observed:

> "But they consider it to be clear that when he (the father) himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment (Civil Procedure Code)."

This pronouncement was understood by the learned Judges of the Nagpur High Court as showing that even the actions of a legal guardian were controlled not by the personal law of the parties but by the Civil Procedure Code when the legal guardian was appointed a guardian '*ad litem*. The earlier decision on this point of several High Courts have been noticed in paragraph 24 of the judgment.

13. The learned counsel for the respondents wanted me to follow the Bombay decision in preference to that of the Nagpur High Court. I would prefer, with respect, to follow the Nagpur High Court's decision. The result is that the Civil Procedure Code in so far as the matter relates to the proceedings before the Court overrides the personal law. The decisions of the Supreme Court in *Mohd. Amin and others* v. *Vakil Ahmad and others*[1] and *Gulam Ghouse* v. *S. S. A. M. Kamisul*[2], had no occasion to go into the provisions of Order 32, rule 7 and, therefore, they do not apply. In regard to the cases to which Order 32, rule 7 applies, the relevant law has to be taken from the decision of the Supreme Court in *Kaushalya Devi* v. *Baijnath*[3]. Consequently, in a case where there is a failure to comply with Order 32, rule 7, the compromise would not be void *in toto*, but would only be voidable at the instance of the minors and the majors would be bound by it.

14. It is not in dispute that items 1 to 17 of the 'A' Schedule are properties allotted to defendants 1 and 3, who are majors. They would be bound by the compromise decree. With reference to these properties the plaintiffs' claim deserves to succeed, subject to what is indicated at the close of the judgment.

1. 1952 S.C.R. 1133: 1952 S.C.J. 539.
2. (1971) 3 S.C.R. 734: A.I.R. 1971 S.C. 2184
3. (1962) 1 S C J. 684: A.I.R. 1961 S.C. 790.

15. The learned counsel for the respondents contended that a compromise has no better status than that of being a contract and that the decisions in *Mohd. Amin and others* v. *Vakil Ahmed and others*[1], would continue to apply. However, in so far as the compromise is one to which Order 32, rule 7 applies, it is the decision in *Kaushalya Devi* v. *Baijnath*[2], that would have to be applied.

16. My attention was drawn to the decisions in *Maqboolan* v. *Habib Ullah*[3], and *Imambandi and others* v. *Mutsaddi and others*[4]. The first decision in so far as it is inconsistent with the decision of the Supreme Court in *Kaushalya Devi* v. *Baijnath*[2], cannot be followed. The second, does not lay down any proposition inconsistent with the Supreme Court's decision in *Kaushalya Devi's case*[2].

17. Even prior to the decision of the Supreme Court there are decisions which have held that the decree would be voidable as against the minor but would be binding as regards the others, who are not minors. See *Durga Charan* v. *Akkari Das*[5] and *Chidambaram* v. *Subramanian*[6]. In the Madras case, the judgment in which was rendered by Venkatarama Aiyar, J, as he then was, though there is no discussion as such, the opinion of the Court that a decree in terms of the compromise as against the majors could be passed is clearly expressed at page 506. Thus, the plaintiffs are entitled to succeed in the present suit as against those items to which first defendant is entitled.

18. The learned counsel for the respondents submitted that the compromise was void *in toto* for the reason that it lacks consideration. It has been held in *Rameshar Mistri* v. *Babulal Pandit*[7], that when the matter had been compromised during the pendency of the suit the compromise by a litigant irrespective of the rights and wrongs of the parties was a good consideration for the compromise. I agree with this decision and I hold that the settlement of a disputed claim in a *bona fide* litigation is itself a consideration passing from one side to the other and that the compromise would, therefore, be supported by consideration.

1. 1952 S.C.R. 1133: 1952 S.C J. 539.
2. (1962) 1 S.C.J. 684: (1961) 3 S.C.R. 769: A.I.R. 1961 S.C. 790.
3. (1927) 102 I.C. 470: A.I.R 1927 Oudh 222.
4. L.R. (1918) 45 I.A. 73: 35 M.L.J. 422.
5. A.I.R. 1949 Cal. 617.
6. (1952) 2 M.L.J. 524: 65 L.W. 980: A.I.R. 1953 Mad. 492.
7. A.I.R. 1946 Pat. 97.

19. The learned counsel drew my attention to the fact that the possession of the properties was delivered on the basis of the compromise and that the giving up of the plaintiff's right for an accounting of the profits in respect of the Ceylon properties also furnished consideration. In the compromise memo. it is provided that the first plaintiff was at liberty to realise the share of plaintiffs and the 8th defendant by appropriate steps and the compromise was entered into without prejudice to those rights. It is not necessary for me to decide whether clause 7 of the compromise memo. resulted in the plaintiffs' giving up the right to accounting. It is enough to point out that the compromise was acted upon by reason of its having been taken notice of in the section 145 proceedings, in the deliveries of properties and in the withdrawal of certain amounts in Court deposit. When the compromise is so acted upon, it is too late for the respondents to contend that it lacks consideration.

20. Another point that was urged on behalf of the respondents was that the compromise had been entered into on behalf of the first defendant by her power of attorney agent and that the agent could not have represented her in the transaction. It is not in dispute that the power is a general power. The power of attoeney itself is not before me. The only aspect adverted to was that the power of attorney was executed long prior to the Court proceedings. In order to exercise power, it is only necessary that the grant of power should have preceded the exercise of power. Therefore, the fact that the power was executed before the earlier litigation or that the power was granted at a time when the litigation had not even been commenced so as not to be in the contemplation of the parties is not relevant. I see no substance on this point. For the reasons given above, though the settlements were valid, still the compromise in so far as it affects the majors is binding on them. The plaintiffs would be entitled to a share in the said properties. The appellant is entitled to a half share in items 6 to 10 and 14 and 15 and a half share in the sale proceeds of items 11, 12 and 13 with a charge on the other half of the first defendant in her other properties. Preliminary decree on the above terms will be drawn up. In view of the decree being passed in favour of the plaintiffs to the extent of half share in the properties, the contention of the alienees was that they should be so accommodated and that the properties to the extent possible should be allotted to the shares of the alienors, so that they will get equities. I think there is equity in this contention. I direct accordingly.

21. The appeal is allowed. No order as to costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Sri Pushpagiri Mutt, Cuddappah, A.P., by its Peedathipathi Sri Vidya Nrusimha Bharathy Swamy Varu ... *Petitioner**

v.

Ramalinga Sastri and others ... *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Executive Officer appointed for Pushpagiri Mutt in pursuance of scheme framed—Suit for declaration of title and possession by Mutt in the name of Executive Officer—Suit dismissed for default—Application for restoration also dismissed—Appeal against order of dismissal—Pending appeal scheme becoming inoperative—"Peedathipathi" himself becoming proper person to represent the "Mutt"—Petition for amendment of the cause title dismissed—Revision against order of dismissal also dismissed for non-prosecution—Appeal against the order refusing to restore the suit dismissed as not maintainable by the "Executive Officer"—Revision against order—Petitioner granted permission to amend the cause title.

Held: That in the circumstances of the case to meet the ends of justice, the petitioner should be allowed to seek the proper amendment of the proceedings in the lower Court to show "Sri Pushpagiri Mutt, Cuddappah, Cuddappah District, Andhra Pradesh" as the plaintiff or the appellant, as the case may be, represented by the proper authority or representative as on date. [*Para.* 6.]

Case referred to:—

Mura Mohideen v. *V.O.A. Mohomed*, (1955) 1 M.L.J. 337: 68 L.W. 181: I.L.R. (1955) Mad. 1293: A.I.R. 1955 Mad. 294.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of

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*C.R.P. No. 1341 of 1975. *6th March*, 1978.

the City Civil Court (Principal Judge), Madras, dated 16th August, 1974 and made in C.M.A. No 65 of 1972 (I.A. No. 17709 of 1971 in O.S. No 4087 of 1965, Fourth Assistant Judge, City Civil Court, Madras).

K.N. Balasubramaniyan, for Petitioner.

K. Raja, for Respondents 1 and 2.

The Court made the following

ORDER:—The plaintiff in O.S. No. 4087 of 1969 on the file of the Fourth Assistant Judge, City Civil Court, Madras, is the petitioner in this revision. The respondents herein are the defendants in that suit. The plaintiff is Sri Pushpagiri Mutt, Cuddappah, Cuddappah District, Andhra Pradesh. From a perusal of the records in the Court below, certain essential features of the case do emerge out. An Executive Officer was appointed for the plaintiff-Mutt by the Commissioner of Hindu Religious and Charitable Endowments (Administration), Andhra Pradesh, in pursuance of a scheme framed therefor. The plaintiff-Mutt filed the suit for a declaration of title regarding the property at No. 20, Ekambareswarar Agraharam, Park Town, Madras, and for possession of the said property. There is no gainsaying that a Mutt, like an idol is a juridical person and is capable of acquiring, holding and vindicating legal rights through the medium of some human agency, which is ordinarily the agency of the person in charge of its affairs. It is beyond doubt that "Sri Pushpagiri Mutt", is the plaintiff in the suit. However, because an Executive Officer was appointed and was functioning for the plaintiff-Mutt, at the relevant times, the plaintiff-Mutt was described in the pleadings as follows:

> "The Executive Officer of Sri Pushpagiri Mutt, Cuddappah, Cuddappah District". This may not be a proper description of the plaintiff-Mutt. The name or designation of the person representing the plaintiff-Mutt is only secondary. However, the suit on contest by the defendants, on merits was proceeded with and while it was part-heard was dismissed for default on 4th October, 1971. The application, I.A. No. 17709 of 1971, for restoration was also dismissed by the Fourth Assistant Judge, City Civil Court, Madras. The plaintiff-Mutt filed an appeal, C.M.A. No. 65 of 1972 against the orders in I.A. No. 17709 of 1971, and the same cause title in the suit and in the subsequent proceedings in the suit was adopted in filing the said appeal, C.M.A. No. 65 of 1972, which was heard and disposed of by the Principal Judge, City Civil Court, Madras, by judgment and decree dated 16th August, 1974."

2. During the pendency of the appeal, C.M.A. No. 65 of 1972, the aintiff-Mutt preferred C.M.P. No. 1013 of 1973 for permission to amend the cause title by removing the present cause title and inserting the new cause title as:

> "Sri Vidya Nrusimha Bharathy Swamy Varu, Peedathipathy, Sri Pushpagiri Mutt, Cuddappah, represented by its Manager.,"

in the plaint as well as in the appeal memorandum. The provocation for this move was found in certain events, which occurred subsequent to the filing of the suit. It was stated that according to the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966, the scheme framed earlier, became inoperative, and the person to represent the plaintiff-Mutt became the Peedathipathy himself even before the filing of the said appeal. As noted earlier, the cause title found in the proceedings was adopted in the appeal. The prayer for amendment in C.M.P. No. 1013 of 1973 itself was not properly couched. Once it is remembered that it is "Sri Pushpagiri Mutt" which had and has a "cause" to be agitated and vindicate certain legal rights, its representation through one or other human agency cannot be of much significance, and if it is described wrongly, it is a case of misdescription of parties, which can be corrected by the Court at any time. To complete the narration of events, C.M.P. No. 1013 of 1973 in C.M.A. No. 65 of 1972, was dismissed by the Principal Judge, City Civil Court, Madras, on 15th July, 1974. A revision, C.R.P. No. 295 of 1976, was preferred to this Court as against the order in C.M.P. No. 1013 of 1973 and the said revision has been dismissed by this Court on 11th July, 1977, for not taking steps to serve the respondents therein.

3. The Principal Judge, City Civil Court, Madras, has dismissed C.M.A. No. 65 of 1972 on the reasoning that the Executive Officer of Sri Pushpagiri Mutt is not competent to maintain the appeal in view of the orders passed in C.M.P. No. 1013 of 1973. The present revision is directed against the judgment and decree in C.M.A. No. 65 of 1972. The

question that comes up for consideration in this revision is as to whether the Court below is right in dismissing the main appeal itself on the reasoning given by it.

4. There is no dispute that the appeal memorandum in C.M.A. No. 65 of 1972 was signed and presented by the very same counsel, who was also appearing for the plaintiff-Mutt in the suit. The signing of the memorandum by the pleader would satisfy Order 41, rule 1 of the Code of Civil Procedure. Order 3, rule 4, sub-rule (2) of the Code of Civil Procedure, as it stood prior to the amendments introduced by Act CIV of 1976, states that every appointment of pleader filed in Court shall be deemed to be in force.....until all proceedings in the suit are ended so far as regards the client. Sub-rule (3) of the said Rule says that for the purposes of sub-rule (2)....any appeal from any decree or order in the suit....shall be deemed to be proceedings in the suit. Hence the representation of the plaintiff-Mutt for the appeal and the presentation of the appeal by the counsel who appeared for it in the suit, were competent on the original appoinment given to him. It must also be remembered that the suit and the appeal were on the file of the City Civil Court, Madras, the suit on the file of the Fourth Assistant Judge, City Civil Court, Madras, and the appeal on the file of the Principal Judge, City Civil Court, Madras. Whatever wisdom prompted the plaintiff-Mutt to file the application, C.M.P. No. 1013 of 1973, seeking the amendment of the cause title in the form it was sought, the granting of the said application would not find a solution for the real problem. The reliefs claimed in the suit and in the appeal, C.M.A. No. 65 of 1972 are by the plaintiff-Mutt, *viz.* "Sri Pushpagiri Mutt, Cuddappah". The plaintiff Mutt has to be represented by some person. Instead of filing the suit as "Sri Pushpagiri Mutt, Cuddppah, represented by the proper person", the plaintiff-Mutt has been wrongly described, giving the representative's name and designation in the first place, and stating him to represent the plaintiff-Mutt. This mistake in the description of the plaintiff-Mutt has crept in the plaint in the suit itself, and has been carried over and repeated in the appeal memorandum in C.M.A. No. 65 of 1972. As stated above, the prayer, in the application for amendment of the cause title in C.M.P. No. 1013 of 1973 is not on a better footing, and the dismissal of the said application has not worsened the position.

5. Once it is remembered that it is "Sri Pushpagiri Mutt, Cuddappah", which intends to sue in the suit and which alone wants, reliefs in the appeal, C.M.A. No. 65 of 1972, its wrong description in the sense of its wrong representation or improper representation can always be corrected by the Court. Any change in the representation of the plaintiff-Mutt due to change of circumstances or subsequent events can be taken note of, and the plaintiff-Mutt must be allowed to bring in the proper representative on record in the lis. Proper representation of the party is a question of description of the party, and not one of addition of new parties. Neither the description of the plaintiff-Mutt in the appeal memorandum in C.M.A. No. 65 of 1972, which has merely carried over and adopted the description in the suit, nor the description that was sought to be introduced in the application, C.M.P. No. 1013, is a proper one; and it does not bring to the forefront the patent fact that it is really "Sri Pushpagiri Mutt, Cuddappah" who is the plaintiff in the suit and the appellant in the appeal. Viewed in the above light, and taking into consideration the features of the case, as disclosed above, there was no warrant in law for the Court below, to dismiss the appeal, C.M.A. No. 65 of 1972, itself on the ground that C.M.P. No. 1013 of 1973 has come to be dismissed. The appellant is "Sri Pushpagiri Mutt, Cuddappah". On the facts disclosed and placed before the Court, its representation by the Executive Officer, needs deletion and correction. The proper person competent to represent it on date must be brought on record In *Mura Mohideen* v. *V.O.A. Mohamed*[1], a Division Bench of this Court consisting of Rajamannar, CJ. and Rajagopala Ayyangar, J., laid down the law with regard to amendment arising out of misdescription of parties in the following terms:

> "If, however imperfectly and incorrectly a party is designated in a plaint the correction of the error is not the addition or substitution of a party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake. The question in such a case is one of intention of the party and if the Court is able to discover the person or persons intended to sue or to be sued a mere

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1. I.L.R. (1955) Mad. 1293: (1955) 1 M.L.J. 337: 68 L.W. 181: A.I.R. 1955 Mad. 294.

misdescription of such a party can always be corrected provided the mistake was *bona fide*. Vide Order 1, rule 10, C.P. Code. Such an amendment does not involve the addition of a party so as to attract section 22 (1), Limitation Act."

6. Applying the above principles, I allow this revision and to meet the ends of justice, I direct the petitioner herein to seek the proper amendment of the proceedings in the Courts below to show "Sri Pushpagiri Mutt, Cuddappah, Cuddappah District, Andhra Pradesh" as the plaintiff or the appellant, as the case may be, represented by the proper authority or representative as on date. The Court below will restore the appeal, C.M.A. No. 65 of 1972 to its file, to hear the same on merits, after allowing the petitioner herein to amend the cause title in the proceedings as indicated above, if the application for such amendments is made within a fortnight from the date of hearing of the said appeal to be fixed and notified by the Court below, on receipt of the records by the Court below. If such an application for amendments is not made by the petitioner herein within the time given above, the Court below will dismiss the appeal, C.M.A. No. 65 of 1972 for, non-compliance with the directions given by this Court. Considering the fact that the petitioner herein has not been alert in seeking the proper amendment, the petitioner will pay the counsel for respondents 1 and 2 herein a sum of Rs. 100 as costs within two weeks from this day.

R.S. ——— *Revision allowed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ., G. Ramanujam and M.A. Sathar Sayeed, JJ.*

Christinamary Stella ... *Petitioner**

v.

Dr. Vijay Siddharaj and another ... *Respondents.*

Indian Divorce Act (IV of 1869), section 47 — "Shall" in section not to be rigidly understood—Absence of pleading regarding collusion between spouses—Effect.

Section 47 of the Divorce Act says that every petition under the Act for a decree of dissolution of marriage, or of nullity of marriage, or of judicial separation shall state that there is no collusion or connivance between the petitioner and the other party to the marriage. The word "shall" in section 47 ought not to be understood in a rigid manner. Collusion as between the two spouses in order to snatch an order for dissolution of a solemn marriage can easily be discovered even if the pleadings are delightfully silent about the prescribed norms in section 47. Each case has to be decided on its own merits. The mere absence of a specific plea about the absence of collusion would not vitiate the entire matter so as to compel a Court exercising jurisdiction under the Indian Divorce Act, to dismiss the petition *in limin*. If proof *aliunde* is available so as to satisfy the conscience of the Court that there was no such collusion and that such evidence is available either in the pleadings or in the course of the hearing the petition or at any other specific subsequent stage, this could be taken into consideration and a mere accent upon the verb "shall" in section 47 shall not be the sole criterian for the dismissal of a petition by a wife who is faced with a circumstance where her husband has openly violated the matrimonial bond and taken a second wife and has deserted her since 1974.

[*Para.* 5.]

Cases referred to:—

Premlatika v. *Provash*, A.I.R 1953 Cal. 242; *Clarance* v. *Rachel*, A.I.R. 1964 Mys. 67.

Case referred by the District Court, Pudukkottai in letter D. No. 1345, dated 25th February, 1977, under section 17 of the Indian Divorce Act, 1869, for confirmation of the decree *nisi* passed on 16th September, 1976, in O.P. No. 40 of 1976 of the file of the District Judge, Pudukkottai.

C.M.P. No. 9401 *of* 1978.

Petition praying to permit the petitioner to file her affidavit as additional evidence and the marriage extract dated 17th December, 1977 and the marriage certificate dated 14th December, 1977, issued by the Sacred Heart Church, Pudukkottai, and the Executive Officer of Arulmigu Siddeswaraswamy Koil, Kanjamalai, Salem District, respectively.

V. Raghupathi, for Petitioner.

Hamsala Rajendran (amicus curiae,) for Respondents.

The Judgment of the Court was delivered by

Ramaprasada, Rao, CJ.—This case comes up before us for confirmation of the order passed

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*P.M.C. No. 5 of 1977 and C.M.P. No. 9401 of 1978.
7th September, 1978.

by the District Judge, Pudukkottai, who allowed the petition filed by the first wife and dissolved the marriage as between the petitioner and the first respondent on the ground that the first respondent contracted a second marriage with the second respondent after the solemnisation of the first marriage and that the first respondent deserted the petitioner and is permanently living with the second respondent and had a child through her also. The facts, as disclosed in the petition, are that the first respondent married the petitioner on 19th February, 1973 in the Sacred Heart Church, Pudukkottai, and the marriage solemnisation certificate, though not filed in the trial Court, has been filed in this Court which we mark as Exhibit C-1. Having thus married the petitioner on 19th February, 1973, it appears that the first respondent married again, 20 days thereafter on the 11th of March 1973, the second respondent and was not frequenting the petitioner. The case of the petitioner is that after the first respondent took the second respondent as his wife without her knowledge and consent, the first respondent suppressed such an act of adultery and neglected the petitioner also for a considerable length of time. The petitioner's further ease is that by mistake she did not add in the original pleadings about the fact of both the petitioner and the first respondent having lived together lastly for about five days up to 14th May, 1974, in Pudukkottai. In order to fill up the void in the pleadings, C.M.P. No. 9401 of 1978, was taken out in this Court for permission to file an additional affidavit disclosing such factual residence together of the two spouses at Pudukkottai on or about 14th May, 1974. Having regard to the facts in this case and as there is no opposition we permitted the petition and admitted the additional affidavit in support of the pleadings already on record. On the ground of adultery and taking another woman in marriage during the subsistence of the first spouse the application for dissolution of marriage was filed in the District Court of Pudukkottai under section 10 of the Indian Divorce Act. Though the respondents were served, they were absent in the trial Court. In fact, the learned District Judge noticed that Thiru Rangaswami Iyengar, advocate, filed vakalat for both the respondents. But thereafter no counter was filed and no representation was made. The petitioner examined herself as P.W. 1 and spoke to the facts already referred to. When the matter came up before us in the first instance we perused the record and found that there was no specific allegation about the last residence of the spouses at Pudukkottai, and Mrs. Hamsala Rajendran appearing for the first respondent, having taken up a preliminary objection about the maintainability of the petition itself on the technical ground that the District Court, Pudukkottai, had no jurisdiction to entertain the petition in the absence of a specific plea that the spouses were last residing together within the jurisdiction of the Pudukkottai District Court, we permitted the petitioner to file an additional affidavit, which has since been filed and the permission to entertain the said affidavit has been granted by us in C.M.P. No. 9401 of 1978. Another objection taken by Mrs. Rajendran, acting as *amicus curiae* for the first respondent was that there was no specific allegation about collusion in the pleadings and as such an allegation is a condition precedent for the maintainability of the application itself, this is a fatality which cannot be cured and hence this petition has to be dismissed.

2. The petitioner's counsel filed another document in proof of the second marriage, which again was not filed in the Court below. It is marked as Exhibit C-2 under which it is fairly clear that the first respondent took the second respondent as his wife and that the marriage was celebrated at Sri Sidheswaraswami Temple Kalyanamantapam, Kanchamalai, Salem District. On the basis of the testimony of P.W. 1 which was not challenged in any manner, but in the light of the inchoate pleading, the learned District Judge issued an order of dissolution subject to confirmation by this Court.

3. We may refer to the fact that this case came up earlier before us and in the perspective of events we gave an opportunity to the petitioner to the complete the pleading at least at this stage and let in proof about the place of the last residence as between herself and the first respondent. It is in that context that the affidavit filed with C. M. P. No. 9401 of 1978 has been accepted by us. This shows that the petitioner and the first respondent were last residing together at Pudukkottai. No doubt, the learned counsel for the first respondent is right when she pointed out the lacuna in the pleadings and even in the testimony of P.W. 1 about the absence of a specific allegation as to the place of last residence as between the two spouses. This, in our view, is purely a question of fact which could be supplemented even at the stage when the matter comes up for confirmation of the order of dissolution by

this Court. This is a case in which both the respondents are aware of the petition. They did not participate in it. They never wanted to involve themselves in it and the learned counsel for the second respondent, who is also appearing as *amicus curiae* before us says that she has no objection for the grant of an order of dissolution of marriage as prayed for. Taking all these circumstances into consideration and as no counter was filed we, after accepting the evidence of the petitioner through her affidavit filed in C.M.P. No. 9401 of 1978, are of the view that there is sufficient material on record to show that the spouses last resided within the local limits of the original jurisdiction of the District Court of Pudukkottai. The decisions referred to by Mrs. Rajendran as *amicus curiae* for the first respondent, namely, *Premlatika* v. *Provash*[1] and *Clarance* v. *Rachel*[2] are distinguishable. In the Calcuttacase there was absolutely no evidence. The Special Bench noticed the records and in the absence of any supplementary pleading or an attempt on the part of the aggrieved spouse to supplement the pleading and the record, they had to necessarily hold that the District Court which passed the order of dissolution did not have the requisite jurisdiction to pass the order, as the place where the spouses resided or last resided was not established to the hilt. In the Mysore case, the Special Bench noticed, as a fact, that there was no material to show that the two parties were together at any time within the limits of the District Court to which portals the case was brought excepting to allege that they were present on the date of marriage. The facts in our case are different. No doubt, as we said, the original pleadings were defective. But the respondents never challenged the pleadings or the course of the litigation. The petitioner has filled up the void in this Court by filing the supplemental affidavit and swore that she and her husband lived together as such spouses at Pudukkottai at her permanent residence for five days up to 14th May, 1974. This allegation which is not controverted is sufficient to rest jurisdiction in the District Court, Pudukkottai to entertain the petition which was filed after two years after such date of desertion. The petition was filed on 24th June, 1976. The allegation is that on and after 14th June, 1974, the first respondent kept himself out of the company of the petitioner, and, therefore, the petitioner, by supplementing the pleadings which have not been challenged before us, has established that she and her husband last resided together at Pudukkottai. Therefore, it follows that the Disrtict Court, Pudukkottai, as the Court of original jurisdiction, within whose local limits the petitioner and the first respondent last resided together, did have the jurisdiction to entertain the application.

4. On the merits, we are satisfied that the first respondent took the second respondent as his wife as pleaded and it is proved by the production of Exihibit G-2 which is a record maintained in the regular course by Sri Sidheswaraswami Temple Kalyanamantapam authorities. Therefore, it follows that the first respondent contracted a marriage with another woman within the meaning of section 3 (8) of the Indian Divorce Act when the former spouse of his was alive and without her consent and knowledge. Therefore, he has committed an act which entitled her to present a petition for dissolution of marriage under section 10 of the Divorce Act.

5. The only other ground of attack by the learned counsel for the first respondent is that the allegation as to collusion has not been expressly mentioned and that such a reference as to collusion is the *sine qua non* for the grant of relief under the Indian Divorce Act. No doubt, the language of section 47 of the Divorce Act says that every petition under the Act for a decree of dissolution of marriage, or of nullity of marriage, or of judicial separation shall state that there is not any collusion or connivance between the petitioner and the other party to the marriage. Rightly, therefore, an accent is given to the verb "shall" appearing in section 47 and the contention of Mrs. Rajendran is that in the absence of compliance with the imperative guideline set in section 47, the petition has to fail. We are of the view that the use of the word "shall" in section 47 ought not to be understood in such a rigid manner. Collusion as between the two spouses in order to snatch an order for dissolution of a solemn marriage can easily be discovered even if the pleadings are delightfully silent about the prescribed norms in section 47. In the instant case, the respondents having entered appearance through an advocate, deliberately kept themselves out of the Court as well as the witness box. Even in this Court they has not given any instructions to the counsel who has been appointed *amicus curiae* to contest the matter. The petitioner, examined as P.W. 1, would say that there was no collusion as between her

1. A.I.R. 1953 Cal. 242.
2. A.I.R. 1964 Mys. 67.

and her husband. These factors cumulatively taken is a valid substitute for the absence of a plea in the pleadings that there was no such collusion as between the spouses. As each case has to be decided on its own merits, the mere absence of a specific plea about the absence of collusion would not vitiate the entire matter so as to compel a Court exercising jurisdiction under the Indian Divorce Act, to dismiss the petition *in limine*. If proof *aliunde* is available so as to satisfy the consience of the Court that there was no such collusion and that such evidence is available either in the pleadings or in the course of the hearing of the petition or at any other specific subsequent stage, this could be taken into consideration and a mere accent upon the verb "shall" in section 47 shall not be the sole criteria for the dismissal of a petition by a wife who is faced with a circumstance where her husband has openly violated the matrimonial bondage and taken a second wife and has desorted her since 1974. We are satisfied that the petitioner is entitled to a decree for dissolution of marriage under section 10, she having proved substantially all the relevant facts which are necessary to enable her to obtain an order of dissolution of marriage. In these circumstances, the order of the Court below is confirmed.

6. We place on record our appreciation of the assistance rendered by Mrs. Hamsala Rajendran as *amicus curiae* for the first respondent who brought to our notice certain lacune appearing on record, which had to be rectified only in this Court.

R.S. *Order granting decree for dissolution of marriage confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Rajalakshmi Ammal and another .. *Petitioners**

v.

S. S. **Piramanayagam Pillai** .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (3) (a) (iii)—Husbands of the petitioners carrying on partnership business in jewellery—Petitioners' claim of the building for the business carried on by their husbands—Whether maintainable.

The contention that merely because the premises where the husbands of the "landlords" carried on a business of their own in partnership belongs to a son of one of the "landlords" they must be deemed to be carrying on the business in their own premises cannot be upheld. [*Para.* 2.]

Once it is taken that the requirements of the husbands of the "landlords" are equally the requirements of the "landlords", as recognised in *Saraswathi* v. *Vadivelu Chettiar*, (1967) 2 M.L.J. 81: I.L.R. (1968) 2 Mad. 584: 80 L.W. 408: A.I.R. 1968 Mad. 70, the language of section 10 (3) (*a*) (*ii*) of the Tamil Nadu Act (XVIII of 1960) is quite comprehensive to enable the "landlords" to recover possession of the premises concerned for the purpose of the partnership business of their husbands. A firm is not a legal entity and the partners composing the same are principals and agents mutually, each partner is carrying on business on behalf of the others. It would not be proper to discountenance the plea of the "landlords" on the ground that the business admittedly carried on by their husbands is a partnership business in which another or others may also have interest. Partnership business is the business of the partners. In a collective sense, the business is that of the partners as a whole, *viz.*, of all the members of the firm. May be, each of them holds a fractional interest. By reading section 10 (3) (*a*) (*iii*) of the Act, it is not possible to spell out any limitation as to the extent of the interest in the business carried on by the landlords or by their husbands. The business could be carried on either as a proprietary concern or in partnership with others. Such a construction alone will be a reasonable one and will serve the object of the provision.

*C.R.P. No. 3595 of 1974. 17*th August*, 1978.

The requirement need not necessarily be that of the "landlord" alone and it can even be that of a member of his family, whose interests the "landlord" is bound to serve. [*Para.* 4.]

Cases referred to:—

Saraswathi v. Vadivelu Chettiar, (1967) 2 M.L.J. 81: I.L.R. (1968) 2 Mad. 584: 80 L.W. 408: A.I.R. 1968 Mad. 70; *Dasmull Sowcar* v. *Syed Ali Mohamed*, (1969) 1 M.L.J. 184: I.L.R. (1969) 2 Mad. 731: 81 L.W. 432: A.I.R. 1969 Mad. 214; *Jayaraman v. Ramalingam*, (1973) T.N.L.J. 393; *Annamalai and Co.* v. *Sital Achi*, (1975) 1 M.L.J. 337.

Petition under section 25 of Tamil Nadu Act (XVIII of 1960) as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Rent Control Appellate Authority (Principal Subordinate Judge), Tirunelveli, dated 28th August, 1974 and made in C.M.A. No. 24 of 1973 (H.R.C.O.P. No. 43 of 1972, Court of the Rent Controller (Principal District Munsif), Tirunelveli).

T. R. Rajagopalan and T. R Rajaraman, for Petitioners.

P. N. Venugopalan, for Respondent.

The Court delivered the following

JUDGMENT.—The two petitioners in this revision, as 'landlords' within the meaning of Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), (hereinafter referred to as 'the Act') sought the eviction of the respondent-tenant herein by invoking the aid of section 10 (3) (*a*) (*iii*) of the Act. According to them, they purchased the premises in question for the purpose of running a jewellery business run by their husbands, which business, having been started by their husbands as partners under the name and style of 'Ameer Jewellery Mart", is being run in another premises which is not their own. The Rent Controller (Principal, District Munsif), Tirunelveli, who entertained the petition of the 'landlords' in H.R.C. No. 43 of 1972, found the case tenable on facts and countenanced their plea for eviction of the tenant and allowed the petition for eviction. The tenant filed an appeal, C.M.A. No. 24 of 1973, which was heard and disposed of by the Rent Control Appellate Authority (Principal Subordinate Judge), Tirunelveli, and the Appellate Authority set aside the orders of the Rent Controller and dismissed the petition for eviction by the 'landlord' on a reasoning that the Premises in which "Ameer Jewellery Mart", the business of the husbands of the 'landlords' is being carried on belongs to the son of the first of the 'landlords'. The present revision is directed against the orders of the Appellate Authority.

2. Before me, it is not disputed that the husbands of the 'landlords' carry on a business of their own in partnership. The contention that because the premises where they are carrying on their partnership business at present under the name and style of "Ameer Jewellery Mart" belongs to the son of the first of the 'landlords' they must be deemed to be carrying on the business in the premises of their own, cannot be upheld. The Appellate Authority points out that the document, Exhibit B-3, which is a registration copy of a sale deed, makes out that the premises where at present the partnership business is being carried on belongs only to the son of the first of the 'landlords'. The ownership can then be only with the son of the first of the 'landlords.' On such facts, it cannot be stated that the ownership of the son is the ownership of the father so that it can be put against a case under section 10 (3) (*a*) (*iii*) of the Act. The reasoning of the Appellate Authority in this connection cannot be upheld.

3. Mr. P. N. Venugopalan, learned counsel for the respondent-tenant, has raised another objection which savours of legal flavour. Learned counsel states that the proceedings having been initiated under section 10 (3) (*a*) (*iii*) of the Act before the amendment introduced by Tamil Nadu Act (XXIII of 1973), the requirement of the premises concerned for the partnership business of the husbands of the 'landlords' cannot fit in with the said provision. In my view, on a proper construction of the said provision, as it stood even prior to the amendment introduced by Tamil Nadu Act (XXIII of 1973), the case of the 'landlords' as put forth by them can definitely be served by the said provision. Prior to the amendment introduced by Tamil Nadu Act (XXIII of 1973). Section 10 (3) (*a*) (*iii*) of the Act read as follows:—

> "(3) (*a*) A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the building—
>
> (i) ....
>
> (ii) ....

(iii) In case it is any other non-residential building, if the landlord or his son is not occupying for purposes of a business which he or his son is carrying on, a non-residential building in the city, town or village concerned which is his own."

By the amendment, the amended provision reads as follows:

"(3) (*a*) A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the building—

(i)........ ....

(ii)........ ....

(iii) In case it is any other non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on, a non-residential building in the city, town or village concerned which his own."

Even before the amendment, a question came up for consideration as to whether the requirement of the members of the family of the landlord can be served by invoking the provisions of section 10 (3) (*a*) (*iii*) of the Act.

4. Ramaprasada Rao, J., as he then was, in *Saraswathi* v. *Vadivelu Chettiar*[1] held as follows:

"Here I am concerned with the meaning of the expression 'landlord'. Should it in the light of the passages extracted above by me be circumscribed only to the personality of the landlord or should it be extended to his very near and dear relations? No doubt, the Legislature has expressly included the word 'son'. I have made it clear that by such specific inclusion, it cannot be reasonably presumed that other dependants such as wife in the case of a landlord or husband in the case of a landlady can be omitted from consideration while appreciating the need of the landlord or landlady, as the case may be. In the instant case, it is the landlady who is seeking for eviction of the tenant on the ground that her husband is carrying on a business and for such business of her husband her premises is needed. I do not think that a beneficialconstruction' a construotion in consonance with justice, equity, reason and good conscience would exclude a request by a landlady for being put in possession of her building for the use and occupation by her husband for his business. In Hindu society it is the legitimate duty of the wife to provide comfort to her husband and *a fortiori* it is so for furtherance of the interests of the business of her husband in which it can be safely presumed that she is vitally interested.

"Thus, the addition of the word 'son' in section 10 (3) (*a*) (*iii*) of Act XVIII of 1960 does not militate against the adoption of a reasonable and beneficial construction of the word 'landlord' appearing therein. In my view, therefore, the petitioner (wife) is entitled in the circumstances to ask for possession of the premises from the tenant for the furtherance of the business of her husband which he is admittedly and indisputably carrying on."

If the above principle is kept in mind, there is no difficulty in countenancing the plea of the 'landlords' that to serve the requirements of their husbands who carry on business in partnership, they require the premises in question. But, the learned counsel for the respondent puts forth a contention that the business is a partnership business and such a business is not carried on by the 'landlords' themselves and it is being carried on only by their husbands. In my view, this contention is also without substance. Once it is taken that the requirements of the husbands of the 'landlords' are equally the requirements of the 'landlord' as recognised by Ramaprasada Rao, J., as he then was, in the decision referred to above, the language of the section is quite comprehensive to enable the 'landlords' to recover possession of the premises concerned for the purpose of the partnership business of their husbands. A firm is not a legal entity and the partners composing the same are principal and agents mutually, each partner is carrying on business on behalf of the others. It would not be proper to discountenance the plea of the 'landlords' on the ground that the business admittedly carried on by their husbands is a partnership business in which another or others may also have interest. Partnership business is the business of the partners. In a collective sense, the business is that of the partners as a whole, *viz*., all the members of the firm. May be, each of them holds a fractional interest. By reading section 10 (3) (*a*) (*iii*) of the Act, it is not possible to spell out any limitation as to the extent of the interest in the business carried on by the 'landlords' or by their husbands. The business could

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1. (1967) 2 M.L.J. 81: I.L.R. (1968) 2 Mad. 584; 80 L.W. 408; A.I.R. 1968 Mad. 70.

be carried on either as a proprietary concern or in partnership with others. Such a construction alone will be a reasonable one and will serve the object of the provision. The requirement for the business carried on by the landlords in partnership with others can be equated to the requirement of the landlord himself. This has been recognised by a Division Bench of this Court consisting of Srinivasan and Sadasivam, JJ., in *Danmull Sowcar* v. *Syed Ali Mohamed.*[1] That requirement need not necessarily be that of the landlord alone and it can even be that of a member of his family, whose interests the landlord is bound to serve.

5. Learned counsel for the respondent relies on the decision of another Bench of this Court consisting of Kailasam, J., as he then was, and N.S. Ramaswami, J., in *Jayaraman* v. *Ramalingam*[2] for his proposition that the business being only a partnership business of the husbands of the 'landlords', such a requirement cannot be served by invoking section 10 (3) (*a*) (*iii*) of the Act. But, as rightly pointed out by V. Ramaswami, J., in *Annamalai and Co.* v. *Sital Achi*[3], the learned Judges of the Bench were not expressing any definite opinion on the question whether the landlord could ask for possession of a non-residential building for purposes of a business in which either he or any member of his family was only a partner and the decision of the Bench was rendered on the peculiar facts of the case concerned

6. In the present case, there is no dispute that the business is being carried on by the husbands of the 'landlords' in partnership with another. It has not been brought out in evidence that the carrying on of the said partnership business is only a ruse to seek the process of eviction of the respondent-tenant and that the husbands of the 'landlords' have no substantial, direct or active interest in the said partnership business. In the said circumstances, I find that the Appellate Authority has acted with impropriety and irregularity when it set aside the orders of eviction passed by the Rent Controller, and in my view, there is a warrant for interference in revision. Accordingly, this revision is allowed and the orders of the Appellate Authority are set aside and those of the Rent Controller are restored. There will be no order as to costs in this revision. Time for vacating three months.

R.S. —— *Petition allowed.*

1. (1969) 1 M.L.J. 184: I.L.R (1969) 2 Mad. 731: 81 L.W. 432: A.I.R. 1969 Mad. 214.
2. 1973 T.N.L.J. 393.
3. (1975) 1 M L J. 337.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

M. Duraiswami Achari .. *Petitioner**

v.

Pavunammal .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act XXIII of 1973, section 10 (2) and Explanation—*'Wilful default'—What is.*

The *Explanation* was added to section 10 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act in 1973. The landlady in the instant case had given a notice on 17th December, 1973, requiring the tenant to pay up the arrears and to vacate the premises. The tenant did not take any action within the period of two months as contemplated by the *Explanation*. The *Explanation* therefore squarely applies to the facts here as to hold that the default was wilful. The conclusion of wilful default would, therefore, have to follow. [*Para.* 5.]

In view of the fact that the *Explanation* has made the inference of wilful default mandatory in certain circumstances and since the facts in the present case come within the scope of the *Explanation*, to hold that the tenant was in wilful default, the Rent Controller and the learned Subordinate Judge were right in ordering eviction of the petitioner. [*Para.* 6.]

Petition under section 25 of Tamil Nadu Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Principal Subordinate Judge, Vellore, dated 31st January, 1976 and made in C.M.P. No. 28 of 1975 (H.R.C.O.P. No. 11 of 1974, Rent Controller (District Munsif, Arni Court, dated 22nd March, 1975).

M. N. Padmanabhan and M. A. Adiseshan, for Petitioner.

R. Alagan, P.A. Balasubramaniam and *G. Ranganathan*, for Respondent.

The Court delivered the following

JUDGMENT:—This revision petition has been filed against the judgment of the learned Subordinate Judge of Vellore, dated 31st January,

*C.R.P. No. 1085 of 1976. *24th August, 1978.*

1976 in C.M.A. No. 28 of 1975. The tenant was the appellant before him. The tenant had filed R.C.O.P. No 6 of 1974 for depositing 14 months' rent in Court and also to deposit future monthly rents in accordance with the provisions of section 8 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The landlady filed R.C.O.P. No. 11 of 1974 for eviction on the ground of wilful default. It is this eviction petition which came up for consideration before the Rent Controller and by his order dated 22nd March, 1975, the Rent Controller held that the tenant had committed wilful default in the payment of rent, and therefore ordered eviction of the tenant from the premises. It is against this order that C.M.A. No 28 of 1975 was filed. The Rent Controller had also dismissed R.C.O.P. No. 6 of 1974 seeking to deposit the arrears of rent and also the future monthly rents. No further proceeding appears to have been taken against the order in R.C.O.P. No. 6 of 1974.

2. In C.M A. No. 28 of 1975 the learned Subordinate Judge went into two questions, namely (1) whether the tenant had committed wilful default in the payment of rent, and, (2) whether there was a proper notice to quit. He held that there was a proper notice to quit and that the tenant had committed default. He, therefore, confirmed the order of the Rent Controller. It is this order of the learned Subordinate Judge that is now challenged in the present revision petition by the tenant.

3. The learned counsel for the petitioner contended that there was no wilful default in the payment of rent and that the Court below was wrong in proceeding as if there was such a default.

4. The tenant had filed R.C.O.P. No. 6 of 1974 for depositing 14 months' rent. It is clear from this position itself that he was in default for 14 months in the payment of rent. On 17th December, 1973 the landlady sent a notice to the tenant intimating that he had to pay 8 months' rent and that the non-payment of rent was wilful. She, therefore, terminated the tenancy and required the tenant to surrender possession on or before 1st February, 1974. The tenant did not take any action on the basis of this notice, which has been marked as Exhibit B-1. In the reply notice dated 2nd May, 1974, marked as Exhibit A-4, the tenant did not deny that rent was due from him for 8 months. He claimed to have visited the landlady in person and tendered the rent and that it was the landlady that had refused to receive the same. He repeated this, also in his evidence. The landlady's son also went into the witness-box and denied this statement. There are thus only statements of one or the other from the witness-box as to whether there was a meeting between the tenant and the landlady and as to what happened at the time of such a meeting. The learned Subordinate Judge has drawn the inference that if the tenant had approached the landlady and she had refused to receive the rent, the tenant could or would have sent the rent due by him by money order or at least named the Bank wherein he deposited the rent due by him, in accordance with law. Since he had not done so, it was held that he had committed default.

5. The learned Subordinate Judge has referred in this connection to the provisions of section 10 (2) of the Act. Section 10 (2) provides that a landlord who seeks to evict his tenant shall apply to the Controller for direction in that behalf. If the Controller is satisfied that the tenant came within the scope of any of the sub-clauses, then he was liable to be evicted. There is an *Explanation* which provides:

> "For the purpose of this sub-section default to pay or tender rent shall be construed as wilful, if the default by the tenant in the payment or tender of rent continues after the issue of two months' notice by the landlord claiming the rent."

This *Explanation* was added in 1973. As pointed out already, the landlady gave a notice on 17th December, 1973. She required the tenant to pay up the arrears and to vacate the premises The tenant did not take any action within the period of two months as contemplated by the *Explanation*. The *Explanation*, therefore, squarely applies to the facts here so as to hold that the default was wilful. The conclusions of wilful default would, therefore, have to follow.

6. The learned counsel for the petitioner drew my attention to two decisions of Ramaprasada Rao, J., as he then was, in *T.S. R Jagopalan* v. *M.N. Saraswathi Ammal*[1] and *Thaiyanayagi Ammal and others* v. *Ayyavu Chettiar*[2]. These two decisions came to be rendered on 23rd January, 1975, and 5th February, 1976, respectively. It is not clear from these decisions as to whether the learned Judge had occasion to consider the *Explanation* to section 10 (2) of the Act, extracted above. In view

1. C.R.P. No. 303 of 1975.
2. C.R.P. No. 3845 of 1974.

of the fact that the *Explanation* has made the inference of wilful default mandatory in certain circumstances and since the facts in the present case come within the scope of the *Explanation* so as to hold that the tenant was in wilful default, the Rent Controller and the learned Subordinate Judge were right in ordering the eviction of the petitioner.

7 The revision petition accordingly fails and is dismissed. No costs. Time for vacating the premises three months from this date.

R.S. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Valliammai .. *Appellant**

v.

Saroja .. *Respondent.*

Arbitration Act (*X of* 1940), *section* 32—*Defendant in a suit relying on an award as bar to the suit—Award not filed in Court and made into decree—Effect.*

Where there was no evidence to show that an award made by the mediators in a dispute as such had been acted upon and it had not been filed into Court, the unfiled award will be no defence to a suit on the original cause of action. As it was not disputed that the original award, in the present case, had not been filed in Court, the award could not have been relied upon as a defence by the defendant.

[*Para.* 5.]

Cases referred to:—

Suryanarayana Reddi v. *Venkata Reddy*, I.L.R. (1949) Mad. 111: 61 L.W. 289: (1948) 1 M.L.J. 317: A.I.R. 1948 Mad. 436; *Sayyapparaju Surayya* v. *Nekkanti Anandayya*, (1950) 2 M.L.J. 313: 63 L.W. 777: A.I.R. 1951 Mad. 525; *Venkatasubbayya* v. *Bapadu*, (1950) 2 M.L.J. 672: A.I.R. 1951 Mad. 458; *Mohamed Yusuf* v. *Gulam Mohammed*, I.L.R. (1963) Mad. 922: (1963) 2 M.L.J. 287: 76 L.W. 482: A.I.R. 1964 Mad. 1.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam in Original Suit No. 58 of 1972 dated 26th March, 1974.

*A. No. 863 of 1974. *7th August*, 1978.

K. Raman, for Appellant.

B.S. Soundarapandian and *N. Sankara Vadivel*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S.No. 58 of 1972 on the file of the Subordinate Judge, Kumbakonam, is the appellant. The plaintiff is the mother and the defendant is the widow of one Chinnaswamy Odayar who died intestate on 1st April, 1972, leaving behind, him properties described in Schedules A to D to the plaint. The plaintiff and the defendant would be the heirs of Chinnaswami Odayar under the provisions of the Hindu Succession Act, 1956, the plaintiff and the defendant having each a half-share in the properties. The plaintiff therefore claimed partition and separate possession of her half-share in all the properties described in the Schedules. In the written statement filed by the defendant it was stated that that there was a mediation on 10th April, 1972, as a result of which the 'A' Schedule lands were allotted in favour of the plaintiff and the 'B' Schedule and other movables were allotted to the defendant. The decision of the mediators was said to have been engrossed on a paper and the plaintiff and the defendant were said to have agreed and accepted the award. In these circumstances, it was submitted that there was no scope for any partition.

2. The trial Court framed the relevant issues and granted a preliminary decree for partition of the movable properties and directed the plaintiff to bear a half-share of certain debts owed by Chinnasamy Odayar to the Kumbakonam Co-operative Land Mortgage Bank. As regards 'D' schedule properties it was found that there was no such property available for partition and therefore the plaintiff's claim was negatived. The plaintiff's claim with reference to 'A' and 'B' Schedules was negatived because of the award passed by the panchayatdars. The plaintiff has filed the present appeal contesting the conclusion of the Court below as regards 'A' and 'B' Schedule properties.

3. The learned counsel for the appellant submitted that the award had not been filed in Court and no decree had been passed on the basis of the award and that, therefore, the plaintiff's suit in so far as 'A' and 'B' Schedule properties are concerned, could not have been dismissed on the strength of such an

award. For the respondent, the submission was that the award had been acted upon and that therefore the Court below acted rightly in not granting a decree in plaintiff's favour in respect of those properties.

4. The short question that arises for consideration is whether the award dated 10th April, 1972 and marked as Exhibit B-6 stands in the way of the plaintiff's claim for partition. Section 32 of the Indian Arbitration Act provides:

> "Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be enforced, set aside, amended, modified or in any way affected otherwise than as provided in this Act."

With reference to the awards, there is a special provision in sections 14 to 17. Section 14 enables an award being filed in Court. Section 15 provides that the Court may modify or correct an award so filed and section 16 provides for the remitting of an award so filed, under certain circumstances, for reconsideration by the arbitrators. Section 17 empowers the Court to pass a decree in terms of the award. There was a difference of opinion as to whether an award which had not been filed into Court could be relied upon in defence to an action in the context of the provisions of section 32 and the related provisions of the Indian Arbitration Act. In *Suryanarayana Reddi* v. *Venkata Reddi*[1], a Division Bench of this Court held that the provisions of sections 32 and 33 of the Arbitration Act did not extend to a defence as opposed to the filing of a suit, and consequently a defendant would not be precluded from putting forward an award which had been fully performed by him in answer to a claim by the plaintiff based on the original cause of action, although such an award had not been filed under the provisions of the Act and judgment obtained. The effect of the observations of the learned Judges in that case was that even where a defendant who relied on the unfiled award had not performed his obligations thereunder, he could rely on such an award in defence to a suit based on the original cause of action.

1. I.L.R. (1949) Mad. 111: 61 L.W. 289: (1948) 1 M.L.J. 317: A.I.R. 1948 Mad. 436.

Raghava Rao, J., in *Sayyaparaju Surayya* v. *Nekkanti Anandayya*[1] accepted the proposition that even an unfiled award would be a bar to a suit on the original cause of action. But he took a different view in *Venkatasubbayya* v. *Bapadu*[2]. Rajagopalan, J., in an unreported decision in C.R.P. No. 2110 of 1951 expressed the view that the mere existence of an award which did not result in a decree under section 17 of the Act could not be deemed to have taken away the right of suit which could be founded on the original cause of action. P.N. Ramaswami, J. in C.M.A. No. 296 of 1951 and C.R.P. No. 2228 of 1951 took a more stringent view as to the maintainability of a suit on the original cause of action and held that even an unfiled award could be a valid defence to a suit based on the original cause of action. When a similar question came before Venkatadri, J., he referred it to a Full Bench whose decision is reported in *Mohamed Yusuf* v. *Gulam Mohammed*[3], Ramachandra Ayyar, CJ., who delivered the judgment on behalf of the Full Bench after referring elaborately to all the decisions, on the point of this and other Courts, observed :

> "The result of the foregoing discussion is that an award made on a reference out of Court but which has not been filed into Court in accordance with the Act and judgment obtained thereon, cannot ordinarily be put up as a defence to an action."

It was however added that this did not mean that under no circumstances can an unfiled award be relied on as a defence to an action and if the terms of the award had been fully performed by one of the parties thereto it must certainly afford a good defence to an action on the original cause of action by the other party. This was put on the principle of accord and satisfaction.

5. In the present case there is however no evidence to show that the award as such had been acted upon. It is therefore not possible to bring the case within the exception pointed out by Ramachandra Ayyar, CJ., in delivering the Full Bench judgment. The present case would therefore come within the scope of

1. (1950) 2 M.L.J. 313: 63 L.W. 777: A.I.R. 1951 Mad. 525.
2. (1950) 2 M.L.J. 672: A.I.R. 1951 Mad. 458.
3. I.L.R. (1963) Mad. 922: (1963) 2 M.L.J. 287: 76 L.W. 482: A.I.R. 1964 Mad. 1.

the main principle that an unfiled award is no defence to the suit on the original cause of action. As it has not been disputed that the award in the present case had not been filed into Court, the award could not have been relied upon as a defence by the defendant. The Court below was therefore wrong in non-suiting the plaintiff by relying on Exhibit B-6. The appeal is accordingly allowed. A preliminary decree in respect of the half, share of the plaintiff in 'A' and 'B' Schedule properties will be passed. The rest of the decree of the Court below is confirmed. There will be no order as to costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

K. Munuswami Goundar .. *Appellant**

v.

Perumal and others ... *Respondents*

Motor Vehicles Act (IV of 1939), section 95—Lorry loaded with stones carrying two labourers from one place to another for loading and unloading—Rash and negligent driving—Lorry capsising—Injury to persons—Carrying persons in lorry whether legal—Persons whether entitled to compensation.

In the absence of any prohibition in the Motor Vehicles Act itself of any person being carried the question is one of prudence. The standard may vary between two individuals. But this difference cannot have any effect on the compensation. In fact section 95 (2) (*a*) itself contemplates more than two persons travelling in the vehicles, as otherwise, it could not have provided for liability to the extent of not more than "six persons" in a goods vehicle. Though section 95 (2) (*a*) cannot be understood as authorising any goods vehicle to carry up to six persons, if it would not otherwise be legal to do so, still, so long as there is no prohibition against carrying persons in the goods vehicle and so long as the limit is fixed at "six" the statutory liability being up to a maximum of six, itself suggests that there may be more than six travelling in the vehicle but that liability would be restricted to six. Therefore, the intendment of the Act is not to rule out the possibility of more than six persons travelling in a goods vehicle. There is a separate provision for passenger vehicles. But as far as a goods vehicle is concerned, the above provision makes it abundantly clear that even more than six persons could be carried therein but the liability would be restricted to six. The maximum liability is also restricted to Rs. 50,000 including the liabilities arising under the Workmen's Compensation Act, 1923. Thus so long as the number of persons who have claimed compensation does not exceed six, the liability contemplated by the statute arisng out of the negligent and rash driving would have to be sustained. [*Para.* 11.]

Appeals and the Memorandum of Cross-Objections against the order of the Motor Accidents Claims Tribunal, Principal Subordinate Judge, Tiruchirappalli, dated 17th November, 1973, and made in M.A.C.T.O.P. Nos. 23 and 24 of 1971.

Sriramulu and *A. K. Mylswami*, for Appellant.

S. Narayana Iyengar, N. Sivamani and *S. Radhakrishnan*, for Respondents.

The Court delivered the following

JUDGMENT.—The second respondent in O.P. Nos. 23 and 24 of 1971 on the file of the Motor Accidents Claims Tribunal (Principal Subordinate Judge), Tiruchirappalli, is the appellant in both these appeals. There are two appeals because there were two persons in respect of whom compensation was claimed under the provisions of the relevant Act in two separate petitions.

2. On 30th November, 1969, at about 1 P.M. the first respondent was driving lorry No. MDS. 8097 in Annavasal-Kudumlamalai Road. The lorry capsized and Perumal, the petitioner in O.P. No. 23 of 1971 sustained multiple injuries to his person and fracture of his right hand and left leg. He was removed to the Town Government Hospital, Pudukottai, and thereafter was admitted in the Government Headquarters Hospital, Tiruchirappalli, for further treatment. He was permanently disabled partially. He is a married person and is one of the earning members of the family consisting of himself, his parents, brothers and sisters. At the time of the accident, he was about twenty-five years of age, and he claimed to be healthy and hard-working earning a sum of Rs. 6 per day. According to him, it was due to the rash and negligent driving on the part of the first respondent that the lorry

*A.A.O. Nos. 388, 389 of 1974 (with Memorandum of Objections). 26th July, 1978.

capsized resulting in the petitioner sustaining injuries and fracture, His further case was that as a result of the accident and the fracture sustained by him, he was unable to work and earn as usual. He impleaded the driver Venkatachalam, the owner and the insurance company as the respondents and claimed Rs. 15,000 as compensation.

3. In the other O.P., the petitioner is one Ramaswami. He had a son by name Subbiah, aged about twenty years. Subbiah was travelling in the same vehicle on that fateful day, and in the accident, he sustained multiple injuries as a result of which he died. It was claimed that the deceased was earning about Rs. 150 per mensem and as a result of the death, the members of ths family were suffering mental agony and loss of earnings. It was contended that the accident was solely due to the rash and negligent act of the first respondent. A compensation of Rs. 10,000 was claimed.

4. In both the cases, the counter-affidavit filed by the second respondent was more or loss identical. It was contended that the two persons had been carried in the lorry without the consent and knowledge of the owner and that there was no liability on the part of the owner or on the part of the insurance company. It was also pointed out that the two persons had not been employed for loading or unloading and that they were neither invitees nor licencees. The allegation of rash and negligent driving on the part of the first respondent was denied and the quantum of compensation as claimed by them was also disputed. The insurance-company raised almost identifical grounds.

5. The Tribunal went into the question whether the accident was due to any rash and negligent act on the part of the first respondent. After considering the evidence, it held that the first respondent drove the lorry in a rash and negligent manner resulting in the lorry capsising and the two persons sustaining multiple injuries, one of whom lost his life. The quantum of compensation was gone into, and, in the case of O.P. No. 23 of 1971 the person injured was granted a compensation of Rs. 5,000 in respect of his partial permanent disability and Rs. 2,000 for the pain and suffering undergone by him. As regards the other person who lost his life, the compensation awarded came to Rs. 7,000 consisting of Rs. 3,000 for the fatal accident and Rs 4,000 for the suffering, agony and loss of the earning member of the family. On the question as to whether the second respondent, the owner of the lorry, was liable, it was held that even for any unauthorised or illegal act on the part of the driver of the vehicle the owner would be liable as the driver was his servant and agent. It was therefore held that the second respondent in both the cases was liable to pay the compensation. As regards the insurance-company, the Tribunal was of the view that the proviso to section 95 of the Motor Vehicles Act which enables passengers being carried in the lorry by reason of or in pursuance of a contract of employment was attracted to this case and that the insurance company would not be liable to pay compensation in the instant case.

6. The two appeals have been filed by the owner of the vehicle, viz., the second respondent in the Court below and there are cross-objections filed by the two petitioners in the two O.Ps. asking for enhancement of the compensation as awarded by the Tribunal. No appeal has been filed by the insurance-company as such.

7. I shall first deal with the appeals filed by the second respondent in the two O.Ps. He is the owner of the vehicle. He would be liable if the vehicle had been driven in a rash and negligent manner at the time of the accident. I shall separately examine the question as to whether the two persons who travelled in the vehicle would be entitled to compensation on account of any illegality in the performance of the duties by the first respondent. It is enough, at this stage, to examine whether the first respondent had driven the vehicle in a rash and negligent manner.

8. The Tribunal has examined the evidence in detail and has come to the conclusion that there could be no doubt about the first respondent having driven the lorry in a rash and negligent manner resulting in the lorry capsising and the two persons sustaining multiple injuries thereby. I do not think it necessary to cover the same ground. For the reasons given by the Tribunal, with which I agree, I affirm the finding that the driving of the vehicle in a rash and negligent manner is established on the facts herein.

9. The next question that arises is whether the driver of the vehicle acted in any illegal manner so that the persons who travelled in the vehicle, and who sustained injuries too cannot claim any compensation that may be available to them under the statute. The lorry was carrying stone from Annavasal to Thanjavur. In order to load the lorry with the stones, it was necessary to employ some

persons. It was also necessary to unload the stones at the destination, for which also labour would be required. It is true that one could have employed local labour in Thanjavur at the point of unloading for the purpose of doing the necessary work. But, there would be nothing unnatural or illegal in the driver of the lorry taking the necessary labour for the purpose of unloading. After all, the owner would stand to gain by the lorry expeditiously finishing its work of delivery and returning for being used in any other trip. There is nothing to show that there was any prohibition on the part of the owner of the vehicle requiring the driver not to employ any labour or carry any labour during the period of transit. In the absence of any such evidence to show that the driver had been prohibited from employing any such labour or carrying any such labour in the lorry, it is not possible to hold that the driver, first respondent, did anything illegal in taking the labourers. The nature of the work is such that the employment of such persons was wholly necessary and cannot be said to be illegal or unusual. The owner cannot escape liability by merely pleading that what the driver did was something illegal or unusual. Illegality has not been established.

10. The result of the above findings is that the second respondent in both the petitions would be liable in damages. I shall go into the question of the quantum of damages separately. At this stage, it is necessary to notice only one argument which was advanced on behalf of the third respondent, *viz.*, Union Co-operative Insurance Society. It was vehemently contended on its behalf by the learned counsel Mr. Sivamani that the lorry could not have carried any passengers at all, that carrying of passengers would have involved illegality and that the insurance policy would not therefore avail in order to claim compensation for something that was done illegally. It is in this context that I have to notice section 95 of the Motor Vehicles Act. That section, in so far as it is material, provides:

"(1) In order to comply with the requirements of this chapter a policy of insurance must be a policy which—

(*a*)...............

(*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place:

(ii).......................

Provided that a policy shall not be required—

(1) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act (VIII of 1923), in respect of death of, or bodily injury to, any such employee—

(*a*)....................................

(*b*)....................................

(*c*) if it is a goods vehicle, being carried in the vehicle;

(2) Subject to the proviso to sub-section (1) a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely,

(*a*) where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act (VIII of 1923) in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle."

It is unnecessary to quote the rest of the provision.

11. The learned counsel for the insurance company contended that in the case of a goods vehicle only two persons could have been carried in it and that the liability could arise only in respect of those two persons, if at all. He was not in a position to refer me to any statutory provision which stated that a goods vehicle cannot carry more than two persons. The learned counsel pointed out that the statute contemplated only those persons who are actually necessary for the purpose of carrying the goods and not any person who was employed for loading or unloading purposes. His point was that for loading and unloading, casual labour could have been employed at either end, that it was unnecessary to carry them all the way in the vehicle with all the consequences flowing therefrom. In the absence of any prohibition in the Act itself

of any person being carried the question is one of prudence. The standard may vary between two individuals. But this difference cannot have any effect on the compensation. The learned counsel wants me to read a prohibition in the Act, which the Act itself does not contain. In fact, section 95 (2) (*a*) itself contemplates more than two persons travelling in the vehicle, as, otherwise, it could not have provided for liability to the extent of not more than "six persons" in a goods vehicle. Though section 95 (2) (*a*) cannot be understood as authorising any goods vehicle to carry up to six persons, if it would not otherwise be legal to do so, still, so long as there is no prohibition against carrying persons in the goods vehicle and so long as the limit is fixed at "six", the statutory liability to that extent will have to be worked out. The fact that the statute itself states that the liability is up to a maximum of six, itself suggests that there may be more than six travelling in the vehicle, but that the liability would be restricted to six. Therefore, the intendment of the Act is not to rule out the possibility of more than six persons travelling in a goods vehicle. There is a separate provision for passenger vehicle. But as far as a goods vehicle is concerned, the above provision makes it abundantly clear that even more than six persons could be carried therein but the liability would be restricted to six. The maximum liability is also restricted to Rs. 50,000 including the liabilities arising under the Workmen's Compensation Act, 1923. Thus, so long as the total liability is not in excess of Rs. 50,000 and so long as the number of persons who have claimed compensation does not exceed six, the liability contemplated by the statute arising out of the negligent and rash driving would have to be sustained. I do not, therefore, see any substance in the contention that the insurance company cannot be made liable in this case on account of any illegality as put forward by the learned counsel for the insurance company.

12. The only question that now remains is as regards the quantum of compensation. The learned counsel for the cross-objectors contended that in each case a larger amount than what has been awarded should be awarded. I shall first take up for consideration the cross-objections in the case of Subbiah who lost his life (C.M.A. No. 389 of 1974). The petitioner in that case is Ramaswami, his father. According to him, Subbiah was earning about Rs. 6 per day. He was said to be aged about seventeen years even though in the petition the age was given as twenty years. The Tribunal has computed the compensation by taking an average earning of Rs. 50 per mensem and the duration of the life of the deceased, up to 65 years. It however, considered that Subbiah would have been useful to the family only till he was married, and it is on that basis the loss of earnings was estimated at Rs. 3,000. In other words a sum of Rs. 600 was taken as the annual earning for a period of five years during which Subbiah would have remained, unmarried and stayed with the family. Thus it was considered that a sum of Rs. 3,000 would be the loss of earnings for the family. A further sum of Rs. 4,000 was given for the loss sustained by the family on account of mental pain, suffering and agony. No useful argument was advanced for enhanced compensation than Rs. 4,000 in respect of the mental pain, suffering and agony experienced by the family. As regards the sum of Rs. 3,000 the contention strongly urged by Mr. Narayana Ayyangar was that the Tribunal had no basis for coming to the conclusion that Subbiah would have been in the family only for a period of five years and after marriage he would have left the family. I consider that this criticism of the reasoning of the Tribunal is not well-founded. It is a matter of common knowledge that persons belonging to this class would be ordinarily staying in small houses, sometimes huts, which cannot accommodate more than one family, and that such persons after they get married set up a separate establishment. I do not, therefore, see anything wrong in the Tribunal coming to the conclusion that the loss sustained by the family could only be Rs. 3,000. As far as the loss of earning is concerned, there is no scope for any interference with reference to the case of Subbiah.

13. As regards Perumal, the other person who sustained multiple injuries and who was also fractured in his limbs, the learned counsel contended that a sum of Rs. 5,000 had been arbitrarily fixed by the Tribunal and that it required to be suitably increased. It was submitted that Perumal was earning at least about Rs. 5 or 6 a day and that the average monthly earning of Rs. 60, as taken by the Tribunal was on the low side. It was further submitted that with earnings even at the rate of Rs. 60 per mensem, he would normally live for a period of 40 or 45 years, in which event the compensation should have to be worked out at a higher figure than Rs. 5,000. In a case like this, it is necessary to bear in mind

the fact that Perumal would have been in position to earn for a fairly long period, but for the disability which he had sustained as a result of the accident. The estimate of his earnings in a way appears to be somewhat low. Taking into account the circumstances in which Perumal was placed, I would consider that a sum of Rs. 7,200 per annum as compensation would be more reasonable, so that a sum of Rs. 700 approximately would be available as income and I would enhance the compensation accordingly. The award of Rs. 2,000 as compensation for pain and suffering is reasonable and is confirmed.

14. The result is that the appeals filed by the second respondent are partly allowed in so far as there is modification of the finding of the Tribunal as regards the liability of the insurance company. The award will be a joint and several one. The cross-objections filed in C.M.A. No. 388 of 1974 by Perumal are partly allowed. The cross-objections filed in C.M.A. No. 389 of 1974 by Ramaswami are dismissed *in toto*. There will be no order as to costs.

R.S. —— *Appeals partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

Ponnuswami Gounder .. *Appellant**

v.

Rama Boyan and others .. *Respondnts.*

Specific performance—Suit by some co-promisees to enforce specific performance of agreement to reconvey—Other co-promisees unwilling to specifically enforce—Suit maintainable—Procedure to be followed—Plaintiff entitled to conveyance of entire property on deposit of the entire consideration—Rights of co-promisees to be worked out after execution of conveyance.

Where the plaintiffs are entitled to the relief of specific performance merely because some of the co-promisees have refused to join them as plaintiffs or even where they do not want specific performance of the agreement, their right could not be jeopardised by such refusal by the other parties. In such a case, if the co-promisees do not want to pay the money, the plaintiffs would have to pay in entirety the consideration payable under the agreement to convey or reconvey, as the case may be, and on such deposit of the entire money, they would be entitled to get a reconveyance of the entirety of the suit property though it should normally be in favour of the plaintiffs and the defendants in whose favour the agreement was executed. After the reconveyance is executed as such, the rights of the plaintiffs and the other defendants in whose favour the agreement was executed will have to be worked out. Specific performance as such, therefore, could not be denied to the plaintiffs merely on the ground that the other co-promisees (defendants 2 and 3), have refused to join as plaintiffs or they do not want the conveyance. [*Para.* 3.]

In a case like this, it will not be possible for a co-promisee to give up his right so as to prejudice the rights of the other co-promisees. It will not be open to the promisor to plead that the rights of the other co-promisees should be separated from that of the plaintiffs and that he will execute the conveyance only as regards a portion of the suit properties. [*Para.* 8.]

Cases referred to:—

Koripalli Ramiah v. *Sajee Subbiah*, (1912) M.W.N. 415: 18 I.C. 315; *Kondapaneni Kottayya* v. *Ganyaru Seshayya*, (1913) M.W.N. 995: 21 I.C. 778; *Abdul Shakur Sahib* v. *Abdul Rahiman Sahib*, (1923) I.L.R. 46 Mad. 148: 44 M.L.J 107: 17 M.L.W. 216: 72 I.C. 868: A.I.R. 1923 Mad. 284; *Safiur Rahiman* v. *Muharamunessa Bivi*, (1897) I.L.R. 24 Cal. 832; *Jehar Roy* v. *Premji Bhimji*, A.I.R. 1977 S.C, 2439; *Pyari Mohan Bose* v. *Kedarnath Roy*, (1899) I.L.R. 26 Cal. 409 (F.B.): 3 C.W.N. 271; *Bivi Singh* v. *Nawal Singh*, (1902) I.L.R. 24 All. 226; *Monghbisi* v. *Cooverji Umerky*, (1939) 2 M.L.J. 366: 50 M.L.W. 926: 66 I.A. 210: 182 I.C. 1: A.I.R. 1939 P.C. 170; *Kandasami* v. *Venkatachala Kandar*, (1972) 85 L.W. 616.

Appeal against the decree of the District Court of Dharmapuri at Krishnagiri in A.S. No. 14 of 1973 preferred against the decree of the Court of the Principal District Munsif's Court of Krishnagiri in O.S. No. 1192 of 1971.

V. Nicholas, for Appellant.

V. Krishnan and *P. Veeravaghavan*, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant. The second plaintiff and the third

*S.A. No. 308 of 1975. *24th April*, 1978.

defendant are the sons of the first plaintiff and the second defendant is the wife of the first plaintiff. The suit properties were originally owned by the plaintiffs and defendants 2 and 3. They sold them for a sum of Rs. 2,500 under a sale deed dated 6th May, 1969. On the date of sale itself, the first defendant executed an agreement to reconvey the properties to the plaintiffs and defendants 2 and 3 within five years from the date of sale on receipt of the consideration of Rs. 2,500. It is to enforce this agreement to reconvey the plaintiffs filed the present suit. The plaintiffs tendered the entire consideration within the time stipulated and demanded the execution of the sale deed by the first defendant. They also issued a notice demanding the specific performance, but the first defendant refused to execute the same. Since defendants 2 and 3 did not co-operate with the plaintiffs, the suit was filed by the plaintiffs alone for specific performance of the agreement to reconvey. The plaintiffs had deposited the entire amount of Rs. 2,500 in Court. The main contention of the first defendant was since the agreement to reconvey was in favour of the plaintiffs and defendants 2 and 3 the suit by the plaintiffs is not maintainable and in any case since the second and third defendants did not want any re-conveyance of the properties, the decree for specific performance, could not be granted in favour of the plaintiffs. It was further contended that in any case, the plaintiffs would be entitled to only ⅗ of the properties to be reconveyed and not the entirety. It may be mentioned that the second and third defendant filed a written statement stating that they did not want any re-conveyance, that they have no money to pay and that they give up the right under the contract. The trial Court dismissed the suit following the decision of this Court in *Koripalli Ramiah* v. *Sajja Subbiah and others*[1]. But, on appeal the learned District Judge came to a different conclusion and held that the suit was maintainable, that the plaintiff is entitled to specific performance of the entirety of the contract. In coming to this conclusion, the learned District Judge followed the two later judgments of this Court in *Kondapaneni Kottayya* v. *Gangaru Seshayya* alias *Pede*[2] and *Abdul Shakur Sahib* v. *Abdul Rahiman Sahib and another*[3] in preference to the decision in *Koripalli Ramiah* v. *Sajja Subbiah and others*[1] and the Calcutta decision in *Safiur Rahiman* v. *Maharamunnessa Bibi*[1]. It is against this judgment the first defendant has preferred the second appeal.

2. The question of law that arises for consideration in this second appeal is whether the suit could be maintained by some only of the promisees as plaintiffs in a case where the relief asked for is specific performance of the contract, especially, when the others do not want to specifically enforce the contract. Section 45 of the Contract Act was relied on in *Safiur Rahiman* v. *Maharammunnessa Bibi*[1] and *Koripalli Ramiah* v. *Sajja Subbiah and others*[2] in support of the view that the suit is not maintainable. Section 45 of the Contract Act reads as follows:

> "When person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them, during their joint lives, and after the death of any of them with the representative of such deceased person jointly with the survivor or the survivors and, after the death of the last survivor with the representatives of all jointly."

3. The Supreme Court considered the scope of section 45 with reference to Order 1, rule 1 of the Code of Civil Procedure in the decision reported in *Jahar Roy* v. *Premji Bhimji*.[3] Their Lordships held:

> "The section thus deals with devolution of joint rights in the case of joint promisees, but it does not deal with a case where, a joint promisee does not want to join as a co-plaintiff and is arrayed as a *pro forma* defendant with the specific plea that no relief is claimed against him."

Again, after referring to Order 1, rule 1. Their Lordships observed:

> "This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at

1. 1912 M.W.N. 415: 18 I.C. 315.
2. 1913 M.W.N. 995: 21 I.C. 778.
3. (1923) I.L.R. 46 Mad. 148: 44 M.L.J. 107: 17 L.W. 216: 72 I.C. 868; A.I.R. 1923 Mad. 284.

1. (1897) I.L.R. 24 Cal. 832.
2. 1912 M.W.N. 415: 18 I.C. 315.
3. A.I.R. 1977 S.C. 2439.

law if he does not want to do so. At the same time, it is equally true that a person be cannot be prevented from bringing an action by any rule of law or practice, merely, because he is a joint promisee and the other promisee refuses to join as a co-plaintiff. The proper and the only course in such a case is to join him as a *pro forma* defendant. As would appear from *Biri Singh* v. *Nawal Singh*[1], which was decided in 1898 and *Pyari Mohan Bose* v. *Kedarnath Roy*,[2] which was decided in 1899 it has consistently been held by Courts in this country that where two parties contract with a third party, a suit by one of the joint promisees, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promisee has refused to join him as a co-plaintiff."

The Privy Council also considered the question in the decision reported in *Monghibai* v. *Cooverji Umersey*,[3] and it was held therein:

"It has long been recognised that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not."

This passage was quoted with approval by the Supreme Court in the case above cited. There could, therefore, be no bar that in a case where the contract was in favour of more than one person and if som e of them are not willing to join as plaintiffs, the others could file a suit impl eading those who are not willing as defendants and a person canno tbe prevented from filing a suit merely because he is only a joint promisee and the other promisees have refused to join him in filing the suit. The main basis of the judgments in *Safiur Rahiman* v. *Maharamunnissa Bibi*[4] and *Koripalli Ramiah* v. *Sajja Subbiah and others*[5] is therefore no longer available. In fact the two later bench decisions in *Kondapa neni Kottayya* v. *Gangaru Seshayya* alias *Bede*[6] and *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[7] have dissented from the decision in *Koripalli Ramiah* v. *Sajja Subbiah and others*[5] and held that one of the joint promisees could file a suit impleading the others who are not willing to join them, as defendants in the suit. These two later judgments were followed by Ismail, J., in *Kandasami* v. *Venkatachala Kandar*[1] where the learned Judge had considered the earlier judgments in detail. The learned Judge also pointed out that in a case for specific performance, the relief to be granted being in the nature of discretion of the Court where there are no sufficient grounds for rejecting the claim of the plaintiff for specific performance the Court cannot refuse to grant the relief merely on the ground that some of them had refused to join. The learned counsel for the appellant tried to distinguish the decision in *Ka.dasami* v. *Venkatachala Kandar*[1] on the ground that in that case the learned Judge specifically found that the refusing parties have colluded with the defendant against whom the relief was sought and that therefore the plaintiff was entitled to the relief. I am unable to agree with this argument of the learned counsel. It is true that the learned Judge pointed out that the defendants 2 and 3 had colluded with the first defendant in order to deprive the plaintiff of his right of specific performance. But that was not the ratio of the judgment. In my opinion, the ratio of the judgment is that where the plaintiff is entitled to the relief, merely because some of them have refused to join him as plaintiffs or even where they do not want the specific performance of the agreement, his right could not be jeopardised by such refusal by the other parties. In such a case, I am of the view that if the defendants do not want to pay the money, the plaintiff would have to pay the entirety of the consideration payable under the agreement to convey or re-convey, as the case may be and on such deposit of the entire money, he would be entitled to get a conveyance of the entirety of the suit property though it should normally be in favour of the plaintiff and the defendants in whose favour the agreement was executed. After the conveyance is executed as such, the rights of the plaintiff and the others, defendants in whose favour the agreement was executed will have to be worked out. The specific performance as such therefore could not be denied to the plaintiff merely on the ground that defendants 2 and 3 have refused to join as plaintiffs or that they do not want the conveyance. It may also be pointed out that in a case of this

1. (1902) I.L.R. 24 All. 226.
2. (1899) I.L.R. 26 Cal. 409 (F.B.): 3 C.W.N. 271.
3. (1939) 2 M.L.J. 366: 50 L.W. 926: 66 I.A. 210: 182 I.C. 1: A.I.R. 1939 P.C. 170.
4. (1897) I.L.R. 24 Cal. 832.
5. (1912) M.W.N. 415.
6. (1913) M.W.N. 995.
7. (1923) I.L.R. 46 Mad. 148: 44 M.L.J. 107.

1. (1972) 85 L.W. 616.

nature, it will not be possible for one compromisee to give up his rights so as to prejudice the rights of the other co-promisees. Therefore, the first defendant also would not be entitled to claim that he will execute only with reference to ½ of the suit properties on the ground that if the conveyance is executed in favour of the plaintiffs and defendants 2 and 3, defendants 2 and 3 would be entitled to ½ of the properties conveyed. The rights between the plaintiffs and the defendants would have to be worked out with reference to the agreements between them and it is not open to the first defendant to plead that the second and third defendants' right should be separated from that of the plaintiffs. Accordingly, the judgment and decree of the lower appellate Court is correct and does not call for interference. The second appeal fails and it is dismissed, but there will be no order as to costs.

R.S. *Second appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Ramaprasada Rao, CJ., and G. Ramanujam, J.*

V. Govindasamy and another ... *Petitioners.**

v.

The State of Tamil Nadu, represented by the District Collector of Thanjavur .. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVII of 1961) as amended by the Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act (XVII of 1970), section 5—Husband and wife owning separate lands—Computation for purposes of fixing ceiling—Wife to be taken as a member of the family of the husband—Lands held by both to be treated as one unit.

A conjoint reading of sections 3 (34), 3 (14), 3 (42), 5 (1), 5 (2), 5 (4) and 5 (5) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act clearly indicates that a family, which comes under the definition of a person referred to in section 5 which fixes the ceiling area, can hold a basic extent of 15 standard acres plus five additional acres for every member of the family in excess of 5 subject to the ceiling of 30 standard acres fixed under section 5 (5). According to section 5 (2) for purpose of fixing the ceiling area of the family under that section, all the lands held individually by the members of the family shall be demed to be held by the family. Section 5 (4) clearly provides that where the *stridhana* land held by any female member of the family together with the other land held by the other members of the family is in excess of 15 standard acres, the female member concerned may held, in addition to the extent of the land which the family is entitled to hold under sub-section (1) *stridhana* land not exceeding 10 standard acres. According to the proviso to section 5 (4) (*c*) where the *stridhana* land held by a female member is included in the extent of land which the family is entitled to hold under sub-section (1) and the extent of *stridhana* land so included is more than 10 standard acres, then the female member is not entitled to hold any *stridhana* land in addition to the extent so included. In the light of the provisions set out above, it is not possible to say that the ceiling area of a female member should be fixed separately merely because she holds land apart from the lands held by the other members of the family and thereby exclude her from the fold of the family. Section 5 (4) merely gives a concession to a female member of the family, and merely because a female member is not entitled to that concession, she cannot be treated as being separate from the family for the purpose of fixing the ceiling area of the family, as otherwise it will lead to the absurd result that whenever a *stridhana* land is held by a female member of a family whatever its extent may be, her holding will have to be treated independently without reference to the family and such a position is not tenable on a reading of the provisions of the Act. [*Paras.* 12 *and* 13.]

The view that the holding of the wife can be clubbed along with that of the husband only if she holds 10 standard acres or less and not when she holds more than 10 standard acres receives no support from the Act. The proviso to section 5 (4) seems to suggest that even if the lands held by a female member exceeds 10 standard acres, the same can be included in the holding of the family, but in that event the female member will not be entitled to hold any extra extent as *stridhana* land in addition to the extent included in the family's holding.

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*C.R.P. No. 2135 of 1974. 21*st July*, 1978.

A female member of a family shall not be deemed to be a member of that family only in cases coming under clause (*b*) of section 5 (4), that is only when the additional extent of land which the female member is entitled to hold as *stridhana* under section 5 (4) exceeds 5 standard acres and not in other cases. [*Para.* 14.]

Petition under section 83, Tamil Nadu Act (LVIII of 1961) praying the High Court to revise the decree of the Court of the Land Tribunal, Mayuram, dated 26th April, 1974, and passed L.T.C.M.A. No. 12 of 1973 (M.R.I. 46 (G), Authorsied Officer (Land Reforms), Mayuram.

V. Sridevan, for Petitioners.

The Additional Government Pleader, for State.

The Court made the follwing

ORDER:—In this revision one V. Govindasamy and his wife, G. Gnanambal Ammal are the petitioners. This revision arises out of proceedings taken under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), hereinafter referred to as 'the Act.' The Authorised Officer (Land Reforms) of Mayuram, initiated proceedings against the petitioners under the Act, as amended by the Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act (XVII of 1970). The holdings held by the petitioners on the relevant date are as follows:

	Ordinary acres.	Standard acres.
V. Govindasamy	12.79½	7.13
G. Gnanambal Ammal.	26.48½	15.02
Total :	39.28	22.15

The draft statement under section 10 (1) of the Act was published after satisfying the formalities contemplated under the Act and it was proposed to declare an extent of 8.03 ordinary acres equivalent to 5.02 standard acres as surplus from the above holdings. V. Govindasamy made objections to the draft statement and he put forth two objections. The first one is that his family consists of 9 members, *viz.*, 6 sons, and 2 unmarried daughters and as such, his family is entitled to hold 30 standard acres. The second objection is that pursuant to an agreement of sale entered into on 2nd January, 1970 with one Ghouse Maracair of Eduthakatti Sathanur, he has parted with possession of 8.43½ ordinary acres and hence the said extent should be excluded from the holdings of the family. The Authorised Officer (Land Reforms) of Mayuram, considered these objections and they were repelled by him. Aggrieved by the above decision of the Authorised Officer, the petitioners herein perferred C.M.A. No. 12 of 1973 which was heard and disposed of by the Land Tribunal (Subordinate Judge) of Mayuram, and the Land Tribunal dismissed the appeal. However, it gave a direction to the Authorised Officer to give an option to the parties as contemplated under section 10 (3) and (4) of the Act. The present revision is directed against the orders of the Land Tribunal.

2. Mr. V. Sridevan, learned counsel for the petitioners, is not pressing the contention with reference to the agreement of sale and parting with of possession of an extent of 8.43½ ordinary acres and the learned counsel urges in main the contention with regard to the strength of the family and the right of the family to hold 30 standard acres. To appreciate this contention raised, it will be advantageous if the relevant provisions of the Act are extracted;

Section 5 (1) (*a*) and (*b*) read as follows:

> "5. *Ceiling area.*—(1) (*a*) Subject to the provisions of sub-section (3-A) and (3-C) and of Chapter VIII, the ceiling area in the case of every person (other than the institutions referred to in clauses (*c*) and (*d*) and subject to the provisions of sub-sections (3-A), (3-B), (4) and (5) and of Chapter VIII) the ceiling area in the case of every family consisting of not more than five members shall be 15 standard acres;
>
> (*b*) The ceiling area in the case of every family consisting of more than 5 members shall, subject to the provisions of sub-sections (3-A), (3-B), (3-C), (4) and (5) and of Chapter VIII, be 15 standard acres together with an additional 5 standard acres for every member of the family in excess of five."

3. The expressions used in the above sections are 'person' and 'family'. 'Person' has been defined by section 3 (34) as follows:

> " 'Person' includes any company, family, firm, society or association of individuals, whether incorporated or not; or any private trust or public trust."

Since 'person' includes family, the definition of 'family' in section 3 (14) may be extracted, which is as follows:

" 'family' in relation to a person means the person, the wife or husband, as the case may be, of such person and his or her—

(*i*) minor sons and unmarried daugthers, and (*ii*) minor grandsons and unmarried granddaughters in the male line, whose father and mother are dead."

Section 5 (5) lays down the maximum extent that could be held by a family as follows:

"(5) Notwithstanding anything contained in sub-section (1) and in sub-section (4) and in Chapter VIII the total extent of the land held or deemed to be held by any family shall in no case exceed 30 standard acres."

Section 5 (2) reads as follows:

"(2) For the purposes of this section, all the lands held individually by the members of a family or jointly by some or all of the members of such family shall be deemed to be held by the family."

Section (5) (4) is to the following effect:

"(4) (*a*) Subject to the provisions of sub-section (5) where the *stridhana* land held by any female member of a family together with the other land held by all the members of that family is in excess of 15 standard acres the female member concerned may hold, in addition to the extent of land which the family is entitled to hold under sub-section (1), *stridhana* land not exceeding 10 standard acres:

Provided that where any extent of *stridhana* land hold by a female member is included in the extent of land which the family is entitled to hold under sub-section (I) and in case where the extent so included is—

(*i*) 10 or more than 10 standard acres, she shall not be entitled to hold any *stridhana* land in addition to the extent so included; or

(*ii*) less than 10 standard acres, she may hold in addition to the extent so included an extent of *stridhana* land which together with the extent so included, shall not exceed 10 standard acres.

(*b*) Where the extent of *stridhana* land held under clause (*a*) by any female member of a family consisting of more than five members—

(*i*) is 5 or more than 5 standard acres, she shall not be deemed to be a member of that family for the purposes of clause (*b*) of sub-section (1); or

(*ii*) is less than 5 standard acres, the additional extent of 5 standard acres allowed under clause (*b*) of sub-section (1) shall be reduced by the same extent as the extent of *stridhana* land so hold."

Section 3 (42) defines '*stridhana* land' as follows:

" '*Stridhana* land' means any land held on the date of the commencement of this Act by any female member of a family in hor own name."

The reasoning of the Authorised Officer can be well gathered from the following observation in his order:

"There is no force in the argument put forth by the counsel for the petitioner that he is entitled to hold 30.00 standard acres of land since his family members are 9 and no surplus can be declared under section 1, in the draft statement as already published. The proposed surplus shown in the draft statement published under section 10 (*i*) of the Act has been carved out under section 6 *i.e.*, from the lands held by the lady member, *i.e.*, Gnanambal, wife of Govindasamy as on 15th February, 1970. The number of members in the family has nothing to do with the calculation of ceiling in respect of the land held by the female members of the family since, in this case the surplus arrived at is from the lands held by the female member as on 15th February, 1970, and since only an extent of land held by her, *i.e.*, 5.02 standard acres of lands is over and above 10.00 standard acres, the extent of lands that can be allowed to the female member as *stridhana*, there is no reason to interfere with the surplus declared already in the draft statement prepared under section 10 (*i*)."

The Land Tribunal also has proceeded on the same trend and observes that the first appellant's (the first petitioner) family is entitled to hold 30 standard acres and the second appellant (the second petitioner) can hold only lands not exceeding 10 standard acres.

4. The question that comes up for consideration in the revision is, whether this reasoning of the forums below can be sustained on a proper construction of the provisions of the Act. The definition of 'person' includes a family and 'family' means the person, the wife or husband, as the case may be, of such person and his or her minor sons and unmarried daughters, etc. Section 5 (2) lays down that for the purposes of section 5, all the lands held

individually by the members of a family or jointly by some or all of the members of such family shall be deemed to be held by the family. Section 5 (4) proviso speaks about a case where an extent of *stridhana* land held by a female member is included in the extent of land the family is entitled to hold under sub-section (1). From a reading of the above provisions, it is not possible to say that a female member should be assessed separately thereby excluding her from the fold of the family, whenever that female member holds *stridhana* land. The definition of 'family' takes in the wife and by virtue of sub-section (2) of section 6, all the lands including *stridhana* lands held individually by the members of the family shall be deemed to be held by the family. The husband, the wife and the children within the meaning of section 3 (14) of the Act can go together. Sub-section (4) of section 5 speaks about a concession given to a female member in respect of *stridhana* land. But it cannot be taken that whenever *stridhana* land is held by a famale member of a family, she will have to be assessed independently without reference to the family. Such a construction does not appear to be tenable on a reading of the provisions of the Act. If the above principle is kept in mind, I find that the forums below have not adverted to the same and they have acted under the impression that the female member has to be assessed separately. If the husband, the first petitioner, the wife, the second petitioner and the children, who are stated to be 9 and about which there is no dispute raised, constitute a family then under section 5 (1), read with section 5 (5) the family will be entitled to hold 30 standard acres. In the present case, the total holding comes to 22.15 standard acres. If this is so, the holdings come within the ceiling area and there is no warrant for declaring and taking any surplus.

5. Shri K. Venkatasamy, learned Additional Government Pleader, brings to the notice of this Court the judgment of Mohan, J., in *K.C. Periakolandai Raja* v. *The State of Madras by the Collector of South Arcot at Cuddalore and the Authorised Officer, Land Reforms, Cuddalore*.[1] Though the facts of the case are not clear from the order of the learned Judge the learned judge states as follows:

"I think the view of the Court below that the wife's holding cannot be computed for the purpose of fixing the ceiling of the holding of the petitioner is corect because, admittedly, she owns 25 standard acres in her name. Her holding can be computed along with that of the petitioner only if she holds 10 standard acres or less. Therefore, I am unable to see merits in this revision which is hereby dismissed. No costs."

A reading of the above order seems to convey that the holding of the wife can be computed along with that of the husband only if she holds 10 standard acres or less. Since I am obliged to take a different view, as could be seen from the discussion set out above, I feel that the ambiguities, if any, will stand cleared by a decision of a Bench of this Court. In this view, I direct the papers be placed before my Lord, the Chief Justice for orders for posting before a Division Bench.

6. In pursuance of the above order, this petition coming on for hearing before this Court on Tuesday, the 11th July, 1978, and upon hearing the arguments of Mr. V. Sridevan, Advocate for the petitioners and of the Additional Government Pleader on behalf of the respondent and this case having stood over for consideration till this day, the Court made the following Order:

The Order of the Court was delivered by

Ramanujam, J.—This revision petition was initially heard by Nainar Sundaram, J., but as the learned Judge did not agree with the view expressed by Mohan, J., in *K. C. Periakolandai Raja* v. *State of Madras*[1] which was relied on by the respondent, he referred the matter for an authoritative ruling of a Division Bench.

8. The Authorised Officer (Land Reforms), Mayuram, initiated proceedings for the fixation of the ceiling area of the petitioners herein who are husband and wife under the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act LVIII of 1961) hereinafter referred to as 'the Act,' as amended by the Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act XVII of 1970.

The holdings held by each of the petitioners on the relevant date were as follows:—

	Ordinary acres	*Standard acres*
V. Govindaswamy (Husband)	12.79½	7.13
G. Gnanambal (Wife)	26.48½	15.02
Total	39.28	22.15

1. C. R. P. No. 904 of 1974.

1. C. R. P. No. 904 of 1974.

In the draft statement issued under section 10 (1) of the Act, it was proposed to declare an extent of 8.03 ordinary acres equivalent to 5.02 standard acres as surplus from the above holdings. The first petitioner filed his objections to the draft statement contending (1) that his family consists of 9 members, namely, himself his wife, five sons and two unmarried daughters and as such, his family is entitled to hold 30 standard acres and (2) that in pursuance of an agreement of sale entered into on 2nd Jannaery, 1970 with one Ghouse Maracair, he had parted with possession of 8.43 ordinary acres and hence the said extent should be excluded from the holding of the family. The Authorised Officer repelled those objections and declared an extent of 5.02 standard acres as surplus as proposed in the draft statement.

9. Aggrieved by the decision of the Authorised Officer, the petitioners preferred an appeal in C.M.A. No. 12 of 1973 to the Land Tribunal (Subordinate Judge), Mayuram. That appeal having been dismissed, the petitioners have preferred this revision petition.

10. The second of the objections taken by the petitioners before the Authorised Officer and before the Land Tribunal has not been pressed before us and we are left only with the first contention.

11. As regards the first contention, it is submitted by Mr. V. Sridevan, learned counsel for the petitioners, that the Authorised Officer has erroneously treated 5.02 standard acres out of the lands owned by the second petitioner as surplus, overlooking the fact that the second petitioner being the wife of the first petitioner will have to be taken as a member of his family, that lands held by both of them have to be treated as one unit for the purpose of determining the ceiling area of the family, and that if the lands owned by both the petitioners are taken as forming one unit, then the family of the petitioners consisting of 9 members is entitled to hold 30 standard acres as per the provisions of the said Act.

12. To appreciate the said contention of the petitioners, it is necessary to refer to the material provisions of the Act.

"Person" has been defined by section 3 (34) of the Act as follows:

" 'Person' includes any company, family, firm, society or association of individuals whether incorporated or not; or any private trust or public trust."

Since 'person' has been defined as including in family, we have to see the definition of family. Family has been defined section 3 (14) as follows:—

" 'family' in relation to a person means the person, the wife or husband, as the case may be, of such person and his or her (*i*) minor sons and unmarried daughters, and (*ii*) minor grandsons, and unmarried grand-daughters in the male line whose father and mother are dead."

Section 3 (42) defines '*stridhana* land' as follows:—

" '*Stridhana* land' means any land held on the date of the commencement of the Act by any female member of a family in her own name".

Section 5(1) (*a*) and (*b*) which fixes the ceiling area of every person are extracted below:

"5. *Ceiling area*: (1) (*a*) Subject to the provisions of sub-sections (3-A), and (3-C) and of Chapter VIII, the ceiling area in the case of every person (other than the institutions referred to in clauses (*c*) and (*d*) and subject to the provisions of sub-sections (3-A), (3-*B*), (3-*C*), (4) and (5) and of Chapter VIII the ceiling area in the case of every family consisting of not more than five members shall be 15 standard acres;

(*b*) The ceiling area in the case of every family consisting of more than five members shall, subject to the provisions of sub-sections (3-A), (3-B), (3-C), (4) and (5) and Chapter VIII, be 15 standard acres together with an additional 5 standard acres for every member of the family in excess of five."

Section 5(2) which is quite relevant for the purpose of the present discussion is extracted below:

"(2) For the purpose of this section, all the lands held individually by the members of a family or jointly by some or all of the members of such family shall be deemed to be held by the family."

Section 5(4) so far as it is relevant is as follows:—

"4(*a*). Subject to the provisions of sub-section (5), where the *stridhana* land held by any female member of a family together with the other land held by all the members of that family is in excess of 15 standard acres, the

female member concerned may hold in addition to the extent of land which the family is entitled to hold under sub-section (1), *stridhana* land not exceeding 10 standard acres:

Provided that where any extent of *stridhana* land held by a female member is included in the extent of land which the family is entitled to hold under sub-section (1) and in case where the extent so included is:—

(*i*) 10 or more than 10 standard acres, she shall not be entitled to hold any *stridhana* land in addition to the extent so included; or

(*ii*) less than 10 standard acres, she may hold in addition to the extent so included an extent of *stridhana* land which together with the extent so included, shall not exceed 10 standard acres.

(*b*) Where the extent of *stridhana* land held under clause (*a*) by any female member of a family consisting of more than five members.

(*i*) is 5 or more than 5 standard acres, she shall not be deemed to be a member of that family for the purposes of clause (*b*) of sub-section (1); or

(*ii*) is less than 5 standard acres, the additional extent of 5 standard acres allowed under clause (*b*) of sub-section (1) shall be reduced by the same extent as the extent of *stridhana* land so held."

Section 5 (5) lays down the maximum extent that could be held by a family and that provision is as follows:—

"Notwithstanding anything contained in sub-section (1) and in sub-section (4) and in Chapter VIII the total extent of the land held by any family shall in no case exceed 30 standard acres."

A conjoint reading of the above provisions of the Act clearly indicates that a family, which comes under the definition of a person referred to in section 5 which fixes the ceiling area, can hold a basic extent of 15 standard acres plus five additional acres for every member of the family in excess of 5 subject to the ceiling of 30 standard acres fixed under section 5(5). In this case there is no dispute that the petitioners' family consists of 9 members. Therefore, their family is entitled to hold the maximum extent of 30 standard acres. According to section 5(2) for purpose of fixing the ceiling area of the family under that section, all the lands held individually by the members of the family shall be deemed to be held by the family. As per this provision, the lands held by each of the petitioners has to be clubbed together and treated as the holding of the family. Admittedly the total extent held by both the petitioners is only 22.15 standard acres and that is less than the maximum extent of 30 standard acres which their family can hold as per section 5 (5). The Authorised Officer has however, treated the wife's holding as a separated unit and after deducting 10 standard acres which she is entitled to hold as *stridhana*, the balance has been treated as surplus in her hands.

13. We do not see how the second petitioner who is admittedly a member of the family as per the definition of 'family' in section 3 (14) can be treated as separate unit for purpose of fixation of ceiling area under section 5. Section 5 (4) clearly provides that where the *stridhana* land held by any female member of the family together with the other land held by the other members of the family is in excess of 15 standard acres, the female member concerned may hold, in addition to the extent of the land which the family is entitled to hold under sub-section (1), *stridhana* land not exceeding 10 standard acres. According to the proviso to section 5 (4) (*a*) where the *stridhana* land held by a female member is included in the extent of land which the family is entitled to hold under sub-section (1) and the extent of *stridhana* land so included is more than 10 standard acres, then the female member is not entitled to hold any *stridhana* land in addition to the extent so included. In view of this provision the second petitioner is not entitled to claim any additional extent over and above the maximum ceiling area of 30 standard acres which the family is entitled to hold under section 5 (1). But that does not mean that the second petitioner can be separated from the family and her ceiling area can be fixed separately apart from that of the family. In the light of the provisions set out above, it is not possible to say that the ceiling area of a female member should be fixed separately merely because she holds land apart from the lands held by the other member of the family and thereby exclude her from the fold of the family. Section 5 (4) merely gives a concession to a femal- member of the family, and merely because a female member is not entitled to that concession, she cannot be treated as being separate from the family for the purpose of fixing the

ceiling area of the family, as otherwise, it will lead to the absurd result that whenever a *stridhana* land is held by a female member a family whatever its extent may be, her holding will have to be treated independently without reference to the family and such a position is not tenable on a reading of the provisions of the Act.

14. Mr. K. Venkataswami, learned Additional Government Pleader relied on the decision of Mohan, J., in C.R.P. No. 904 of 1974 and contended that as per the said decision, the wife's holding can be clubbed with that of the husband only if she holds 10 standard acres or less. In the case before the learned Judge the wife held 25 standard acres in her own name and that was not computed along with that of the husband. When such a separate treatment of the holding of the wife was questioned, Mohan, J., observed as follows:—

> "I think the view of the Court below, that the wife's holding cannot be computed for the purpose of ceiling of the holding of the petitioner, is correct because, admittedly, she owns 25 standard acres in her name. Her holding can be computed along with that of the petitioner only if she holds 10 standard acres or less. Therefore, I am unable to see merits in this revision petition which is hereby dismissed."

The above observations of the learned Judge seem to convey that the holding of the wife can be clubbed along with that of the husband only if she holds 10 standard acres or less and not when she holds more than 10 standard acres. We do not see any support for the view taken by the learned Judge from the provisions of the Act. On the other hand the proviso to section 5 (4) seems to suggest that even if the lands held by a female member exceed 10 standard acres, the same can be included in the holding of the family, but in that event the female member will not be entitled to hold any extra extent as *stridhana* land in addition to the extent included in the family's holding. A female member of a family shall not be deemed to be a member of that family only in cases coming under clause (*b*) of section 5 (4), that is, only when the additional extent which the female member is entitled to hold as *stridhana* under section 5 (4) exceeds 5 standard acres and not in other cases. We therefore, disagree with the view taken by Mohan, J., that the holding of a female member can be computed along with that of the other members of the family only if she holds 10 standard acres or less.

15. In this view the order of the Land Tribunal is set aside and the petitioners' holding is declared to be within the ceiling area. We hold that there is no warrant for declaring any extent as surplus from their holdings.

16. In the result the civil revision petition is allowed. No costs.

Revision petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

V. Kasinatha Thevar .. *Appellant**

v.

Sri Gnanapuriswaraswami Devasthanam Thirumakottai. .. *Respondent*

Tamil Nadu Agriculturists Relief Act (IV of 1938), *as amended by Act (VIII of* 1973), *Section* 3 (3) (*iii*) *and* (*iv*)—*Debt—Definition—Scope—Rent payable by tenant whether 'debt', entitling tenant to the benefits of the Act.*

On a suit for recovery of the balance of the amount due under an earlier decree for rent being decreed, the defendant filed an application for recording full satisfaction under the Tamil Nadu Act VIII of 1973 amending the Tamil Nadu Act IV of 1938. The lower Court rejected the application on the grounds that (*a*) the definition of 'debt' in the Act excluded arrears of rent so that the Act did not apply, (*b*) the judgment-debtor was not a cultivating tenant, and (*c*) he was not an agriculturist. On appeal against the order to the High Court,

Held: The definition of the word 'debt' in section 3 (3) (*iii*) comprehends any kind of liability except 'rent' as defined in clause (*iv*). The definition of the word 'rent' in clause (*iv*) takes in the amount due by a *cultivating tenant.* The defendant was not a cultivating tenant. He had taken a large area of 76 acres for cultivation which he could have cultivated in the manner required by the law. If he was not a cultivating tenant, then the rent payable by him will not come within the scope of clause (*iv*) so as to be excluded from clause

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*A.A.O. No. 336 of 1974. *9th August,* 1978.

(*iii*). The result is that the debt will include the rent that is due from the tenant in the present case. [*Para.* 2.]

In view of the admission in the plaint that the defendant was an agriculturist entitled to the benefits of the Act and that was how interest at the concessional rate was claimed, the lower Court's finding that the judgment-debtor was not an agriculturist was patently wrong. Since however, the merits of the judgment-debtor's claim had not been even considered the matter was remanded. [*Para.* 3.]

Appeal against the order of Court of the Subordinate Judge, Thanjavur, dated 29th March, 1974, and made in E.A. No. 207 of 1970 in O.S. No. 113 of 1969.

R. Gopalaswami Ayyangar and *M. Srinivasan*, for Appellant.

V. Ratnam and *K. Srinivasan*, for Respondent.

The Court delivered the folllowing

JUDGMENT.—The defendant in O.S. No. 113 of 1969 on the file of the Subordinate Judge of Thanjavur, is the appellant. The defendant had taken about 76 acres of land belonging to the plaintiff Devasthanam on lease. Possession of the lands were surrendered in the suit filed for recovery of rent. The principal amount due was Rs. 60,256. There were also costs of Rs. 1,939.50, thus totalling about Rs. 62,195.50. The defendant had paid a sum of Rs. 53,221. 83 and, therefore, there was a balance of Rs. 16,239.53 for which the suit was filed. A decree was granted. But an application was filed under Act VIII of 1973 which amended the Tamil Nadu Act IV of 1938. The application was for recording full satisfaction of the decree. According to the judgment-debtor, as against the principal sum of Rs. 60,256 and costs of Rs. 1,939.50 totalling Rs. 62,195 he had already paid prior to the suit Rs. 53,221.83 and during the execution Rs. 14,500, totalling Rs.67,721. 83 so that there was no amount due to the decreeholder as a result of the provisions of Act VIII of 1973. The Court below held that the judgment-debtor was not a cultivating tenant as he had already surrendered possession of the property in fasli 1373. It was also held that he was not an agriculturist. Thus he was not entitled to the benefits of Act IV of 1938 read with Act VIII of 1973. There was also a third ground of decision *viz.*, that the suit was for recovery of arrears of rent and that the definition of 'debt' excluded arrears of rent, so that the Act did not apply. The result was that the petition was dismissed and it is this dismissal that has brought about the present civil miscellaneous appeal at the instance of the judgment-debtor.

2. The first point that arises for consideration is, whether this is a debt which comes within the scope of Tamil Nadu Agricuturists Relief Act IV of 1938 read with Act VIII of 1973. The term 'debt' has been defined in section 3 (3) (*iii*) as follows:

> " 'debt' means any liability in cash or kind, whether secured or unsecured, due from an agriculturist whether payable under a decree or order of a civil or revenue Court or otherwise but does not include rent as defined in clause (*iv*)..............."

The term 'rent' has been defined in clause (*iv*) of the same provision and it runs as follows:—

> " 'rent' means the rent payable by a cultivating tenant under the Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Act 1956, (Tamil Nadu Act XXIV of 1956), or under the Tamil Nadu Public Trusts (Regulation of Adminstration of Agricultural Lands) Act, 1961, (Tamil Nadu Act LVII of 1961) or the rent as defined by the Tamil Nadu Estates Land Act, 1908, whether a decree or order of a civil or revenue Court has been obtained therefor or not, and includes interest payable thereon but does not include costs incurred in respect of the recovery thereof through a civil or revenue Court or the share of the land cess recoverable by the landholder under any law for the time being in force in this State."

The definition of the word 'debt' would show that it comprehends any kind of liability except 'rent' as defined in clause (*iv*). The definition of the word 'rent' in clause (*iv*) takes in the amount due by a *cultivating tenant*. The defendant was not a cultivating tenant. He had taken a large area of 76 acres for cultivation which he could not have cultivated in the manner required by the law. If he is not a cultivating tenant, then the rent payable by him will not come within the scope of clause (*iv*) so as to be excluded from clause (*iii*). The result is that the debt will include the rent that is due from the tenant in the present case. Therefore, the conclusion of the Court below to the contrary is without any foundation.

3. As regards the plea that the defendant was not an agriculturist which was accepted by the

Court below, it is clear that the Court below did not look into the plaint itself. Even in the plaint it had been admitted that the defendant was an agriculturist entitled to the benefits of the Act and that is how interest at the concessional rate had been claimed. The conclusion of the Court below that the judgment-debtor was not an agriculturist is patently wrong. As the Court below has not gone into the merits of the judgment-debtor's claim for the benefit under the Act, it is necessary to send the matter back to the Court below for proper consideration of the merits in accordance with law. The Civil Misscellaneous Appeal is accordingly allowed with costs.

R. S. *Appeal allowed and matter remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, C.J. and M.A. Sathar Sayeed, J.*

Jameela Beevi and others ..*Appellants**

v.

Sheik Ismail ..*Respondent.*

Mohamedan Law—Gift— Requirements.

Deed—Construction—Life estate or gift simpliciter.

In order to constitute a valid gift under the Mohamedan Law, the three necessary elements which constitute such a gift are, a declaration of gift by the giver, the acceptance of the gift by the donee which acceptance may be expressed or may be inferred by necessary implication and lastly delivery of possession of the subject-matter of the gift by the donor to the donee. But in course of time certain exceptions have been engrafted in the matter of the upholding of a gift notwithstanding immediate delivery of possession of the subject-matter of the gift. One such exception is a case where the donor without reserving dominion over the corpus of the property or any share therein, stipulates only for a right to enjoy the income from the property during his lifetime or makes the gift subject to the condition that the donee shall pay the whole of the income from the property or the part thereof to a person of his choice during the lifetime of such a person. Though this appears to be an apparent exception to the generality of the rule embodying the three conditions which would make a valid gift, yet it is not really an exception. Reservation of a right to enjoy the income, though ordinarily called a life-estate does not militate against the validity of the gift because the corpus of it is absolutely given over to a named individual and the condition whereby the income should be enjoyed either by the donor or his nominee does not detract from or violate the essence of a valid gift. If in a given illustration the subject-matter of the gift is sliced away by the donor, or the condition or restriction contemporaneously imposed by the donor is so obvious that one should understand the gift as taking away a portion of the corpus of the gift, the Mohamedan Law does not accept it as a valid gift. The reason is obvious. By imposing such restriction as above, the entirety of the property which is the subject-matter of the gift is not given away but only a portion thereto. This is not possible to make it a valid gift. If, however, the restriction or the condition is such whereby a right to enjoy the income from the gifted property is contemplated and where such enjoyment is by the donor or by his nominee, it would not be tantamount to the taking away a portion of the corpus of the property, but it is only a temporary right to enjoy the usufruct therefrom. [*Para.* 7.]

Held, that in the present case only a life estate was created and not a gift.

Appeal under clause 15 of the Letters Patent against the order of Justice N.S. Ramaswami, dated 30th November, 1974, and made in the exercise of the Appellate Jurisdiction of the High Court in Appeal No. 755 of 1969 preferred to the High Court against the decrees in O.S. No. 38 of 1968 on the file of the Court of Subordinate Judge, Nagapattinam.

S.K. Ahmed Meeran and *A. Abdul Hadi*, for Appellant.

R. Vijayan and *P. Srinivasan*, for Respondent.

The Judgment of the Court was delivered by

Sathar Sayeed, J.— The unsuccessful appellants in A.S.No. 755 of 1969 have preferred the above Letters Patent Appeal. One Sheik Ismail filed a suit for partition and separate possession of his share in E C. and D schedul

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*L.P.A. No. 73 of 1975. 13*th June*, 1978.

properties. The short case of the plaintiff was that he is the eldest son of Shamsudeen and the first defendant in O.S.No. 38 of 1968 is his sister. Defendants 2 and 3 are the sons of the first defendant. Shamsudeen had another son by name Abdul Khader who died in the year 1964 and the 4th defendant is the wife of the said Abdul Khader. The plaintiff's mother Hussain Beebi wife of Shamsudeen died in the year 1962. According to the plaintiff, B schedule properties belong to his mother and he is entitled to a 3/10 share in those properties. His further case was that C and D Schedule properties are family properties and he is entitled to a share in the said properties. His further case was that Shamsudeen has executed two documents under Exhibits B-7 and B-10 in the year 1966 without the consent of the other sharers and the said two settlement deeds were not valid and binding on him.

2. Therefore, he claims a share in the properties. Defendants 1 to 3 contended that the plaintiff is not entitled to any share in the properties except in item 3 of B schedule. They also disputed the share of the plaintiff. *Inter alia*, these defendants contended that by a settlement deed under Exhibit B-7 dated 10th January 1966, Shamsudeen has settled the first item of C schedule property to defendants 1 to 3, reserving to himself only the income therefrom for his life. They also contended that item 2 in C schedule has been settled by Shamsudeen on the second defendant by a deed dated 10th June, 1966 and possession was given to the second defendant. Therefore they contended that the plaintiff cannot claim any share in the C schedule property. We are not concerned with the remaining facts of the case. The trial Court on going through the documents and also the oral evidence, held that the plaintiff is entitled to a share in item 3 of B schedule and item 1 in C schedule. He has also granted a decree for a sum of Rs. 307 towards 2/3rd share of the plaintiff with respect to the moveables in D schedule and directed the plaintiff to pay a sum of Rs. 3,910 to defendants 1 to 3 towards the debts payable by his father and left by him at the time of his death. The learned trial Judge has also directed the plaintiff to pay a sum of Rs. 667 to defendants 1 to 3 payable by the plaintiff towards his share with respect to the funeral expenses of his father Shamsudeen. It is against this judgment and decree in O.S. No. 38 of 1968, defendants 1 to 3 preferred A.S. No. 755 of 1969 to this Court. The main contention and attack of defendants 1 to 3 in A.S. No. 755 of 1969 to the trial Court decree was that the trial Court erred in granting a decree with respect to item 1 of C schedule property in favour of the plaintiff. Let us see what is C schedule property and under what instrument the plaintiff claims that he is entitled to a share in that property. Shamsudeen who is the father of the first defendant and grandfather of defendants 2 and 3 has executed a settlement deed Exhibit B-7 dated 10th January, 1966 in favour of the first defendant. Item 1 of this settlement deed is a rice mill, item 2 is a trust property wherein certain directions are given for the performance of certain Fathias from and out of the income of the said item. Item 3 is a house property in which Shamsudeen and his sons had shares. The plaintiff who is one of the sons of Shamsudeen claims a share in item 1 of the suit C schedule property. As far as item 3 of C schedule is concerned, there is no dispute and nothing has been argued before N. S. Ramaswami, J. who heard the appeal A.S. No. 755 of 1969. The main contention of defendants 1 to 3 who are the appellants before us and who were the appellants in A.S. No. 755 of 1969 is that the plaintiff is not entitled to a share in item 1 of C schedule because, under the settlement deed Exhibit B-7 the disposition was in favour of Shamsudeen so long as he was alive and subsequent life estate in favour of the first defendant and ultimately the property goes to defendants 2 and 3. According to the appellants such a settlement is valid and binding on the plaintiff and the decree granted by the trial Court to the plaintiff with respect to this item is illegal and invalid.

3. When the appeal was heard by N.S. Ramaswami, J., it was erroneously argued on behalf of defendants 1 to 3 that Exhibit B-7 is a gift deed. The donor, Shamsudeen has given and gifted item 3, the house property, under the same deed and therefore it has to be presumed that item 1 of the C schedule has also been gifted to the first defendant. The learned counsel presuming that Exhibit B-7 is a gift deed, argued that a valid gift has been granted to defendants 1 to 3 and therefore the plaintiff is not entitled to a share in item 1 of C schedule property. N.S. Ramaswami, J., on the basis of the arguments of the appellant's counsel held that the document Exhibit B-7 is a gift *in futuro* and not a gift *in presenti* and therefore the said document with respect to item 1 is invalid. According to the learned Judge, the donor has clearly stated in Exhi-

bit B-7 that as far as item 1 of C schedule is concerned after the donor's lifetime, his daughter, the first defendant, should get the property and that too not the corpus but only usufruct and the corpus should be taken ultimately by the grandchildren who are defendatns 2 and 3. The learned Judge held that trial Court was right in its conclusion that the gift is only *in futuro* and as such the donor did not intend to transfer any interest in the property *in presenti* With these observations, the learned Judge (N.S. Ramaswami, J.), dismissed the appeal. It is against the dismissal of A.S. No. 755 of 1969, the above Letters Patent Appeal has been preferred.

4. It is contended and argued before us by the counsel appearing for the appellants that the gift with respect to item 1 of C schedule property is a valid one and the plaintiff cannot claim a share in that property. We have gone through the document Exhibit B-7. In that document, the donor has stated that his eldest son, *i.e.*, the plaintiff was not amicable with him and that in order to avoid disputes in future with reference to the settlor's property after settlor's death, the first defendant on account of the services rendered by her to the settlor, and also on account of her love and affection, will get certain properties. The document further mentions that the settlor would enjoy items 1 and 2 of the settlement deed for his life and after his life, the settlee (first defendant) would take item 1 (rice mill) and utilise for herself the income therefrom after meeting repair expenses, and that after the first defendant's (settlee's) life, defendants 2 and 3 would take the property absolutely.

5. On a fair reading of the settlement deed, it is very clear that what Shamsudeen intended to do with respect to item 1 was, that he wanted to take the income from this property for his life and he did not retain any portion of the corpus or any dominion, that is to say, he should enjoy the usufruct of this item of property, so long as he is alive and after his death, the property will go to the first defendant and after her death, it should go to defendants 2 and 3. Therefore, a reading of the document Exhibit B-7 with respect te item 1 evidences that a life estate has been created in favour of the first defendant and after the death of the first defendant the property will go to defendants 2 and 3.

6. The learned counsel before us has argued that it is a gift pure and simple and the same arguments was also advanced before N.S. Ramaswami, J., when he heard the appeal in the case. If the document is construed to be a gift with respect to item 1 then N.S. Ramaswami J., was perfectly justified in holding that it is a gift *in futuro* and therefore it is not valid. On a fair reading of the document Exhibit B-7 it is clear, as far as item 1 is concerned, it is not a gift but it is only a life estate created by the donor in favour of the first defendant, and after her death the property would go to defendants 2 and 3. The trial Court has, by misapprehension, thought that it is a gift and therefore held that possession was not given to the donee, namely, the first defendant and that Shamsudeen retains his right over the corpus and therefore it is not valid. As stated above, after going through the document it is clear that, as far as item 1 under the document is concerend a life estate is created and not a gift as alleged and contended by the first defendant. In this document, with respect to item 1, there is no descriptive clause resulting in divestiture of the property. The settlement deed, as far as item 1 in C schedule is concerned, explicistly mentions that Shamsudeen will enjoy the property so long as he is alive and after his death, the rice mill will be enjoyed by the first defendant and after her death it will go to defendants 2 and 3.

7. It is well established that in order to constitute a valid gift under the Mohamedan law, the three necessary elements which constitute such a gift are, a declaration of gift by the giver, the acceptance of the gift by the donee which acceptance may be expressed or may inferred by necessary implication and lastly delivery of possession of the subject-matter of the gift by the donor to the donee. But in the course of time certain exceptions have been engrafted in the matter of the upholding of a gift notwithstanding immediate delivery of possession of the subject-matter of the gift. One such exception is a case where the donor without reserving dominion over the corpus of the property or any share therein, stipulates only for a right to enjoy the income from the property during his lifetime or makes the gift subject to a condition that the donee shall pay the whole of the income from the property or the part thereof to a person of his choice during the lifetime of such a person. Though this appears to be an apparent exception to the generality of the rule embodying the three conditions which would make a valid gift, yet it is not really an exception. Reservation of a right to enjoy the income, though ordinarily called

a life estate does not militate against the validity of the gift because the corpus of it is absolutely given over to a named individual and the condition whereby the income should be enjoyed either by the donor or his nominee does not detract from or violate the essence of a valid gift. If in a given illustration the subject-matter of the gift is sliced away by the donor, or the condition or restriction contemporaneously imposed by the donor is so obvious that one would understand the gift as taking away a portion of the corpus of the gift, then Mohamedan Law does not accept it as a valid gift. The reason is obvious. By imposing such a restriction as above, the entirety of the property which is the subject-matter of the gift is not given away but only a portion thereto. This is not possible to make it a valid gift. If however the restriction or the condition is such whereby a right to enjoy the income from the gifted property is contemplated, and whether such enjoyment is by the donor or by his nominee, it would not be tantamount to the taking away of a portion of the corpus of the property, but it is only a temporary right to enjoy the usufruct therefrom.

8. Keeping this position of law in mind, we have to see whether Exhibit B-7 with respect to item 1 is a life estate or a gift *simpliciter*. The counsel for the appellants both before N.S. Ramaswami, J., and before us argued on a wrong misapprehension, that it is a gift and the Courts below, construing item 1 of C schedule as a gift have erroneously held that it is not binding on the plaintiff. The trial Court has taken the view that it is a gift and on the basis of that, it held that possession was not given to the donee and therefore, it violates one of the essential conditions of gift. As stated above, on going through the document Exhibit B-7 it is found that only a life estate is created in favour of the first defendant and not a gift. The trial Court has not applied its mind to this point and has erroneously considered this item of property as falling within the purview section 149 of Mulla's Mahomedan Law. of With great respect, we disagree with the finding of N.S. Ramaswami, J., who held that it is a gift in future. In view of the above observations, we allow the Letters Patent Appeal and set aside the judgment in A.S. No. 755 of 1969 and also the decree in O.S. No. 38 of 1968 of the Sub-Court, Nagapattinam, as far as item I of C schedule property is concerned and confirm the decree of the trial Court in other respects. We direct the trial Court to construe, on the lines indicated above. We, therefore, remand this case to the trial Court for fresh disposal as far as item 1 of C schedule is concerned. Hence, we allow the appeal with costs.

R.S. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.R. Gokulakrishnan, J.*

Sanga Pillai .. *Petitioner**

v.

State of Tamil Nadu and others .. *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), section 78—Powers of Land Tribunal to entertain appeals filed beyond time.

Section 78 of the Tamil Nadu Land Reforms Act is clear as regards the limitation for preferring an appeal against an order of the Authorised Officer. The excusing of delay in preferring an appeal and ultimately passing an order on the said appeal is, in the instant case, arbitrary in nature and such an entertainment of the appeal in the teeth of section 78 of the said Act is an error apparent on the face of the record. The Land Tribunal has no power to entertain an appeal against an order of the Authorised Officer filed beyond the period of limitation. [*Para.* 2.]

K. Srinivasan, for Petitioner.

K. Govindarajan, Government Pleader, for Respondents.

The Court made the following

ORDER.—This revision petition was filed under Article 227 of the Constitution of India before its amendment, questioning the authority of the remand order passed by the Land Tribunal (Principal Subordinate Judge), Tiruchirapalli, in C.M.A. No. 87 of 1974. The facts of the case are: The petitioner herein is an assignee of the surplus lands acquired by the Government and the said assignment was made in his favour on 19th September, 1973. The Authorised Officer (Land Reforms), Pudukkottai, on 19th September, 1973 after carefully examining the claims of the applicants before him, allotted to the petitioner herein 2.02 acres of land in Survey field No. 71/3 as per rule 8 (4) of

*C.R.P. No. 184 of 1976. *3rd November, 1978.*

the Tamil Nadu Land Reforms (Disposal of Surplus Land) Rules, 1965 as amended in G.O. Ms. No. 1870 dated 8th September, 1969. Before such an assignment, the Authorised Officer declared the surplus land of the third respondent herein as 15 standard acres. The third respondent was given an opportunity as the trustee of the Govindadas Ganshyamdas Private Family Trust, to give particulars specifying his desire regarding the lands to be retained by the trust. Even though time was taken, the third respondent herein did not furnish the particulars as called for. Hence the Authorised Officer (Land Reforms) Tiruchirapalli, passed an order under section 10 (3) of the said Act, specifying the land to be retained by the landowner within his ceiling area and stated that the lands specified by him in his order will be notified as suplus lands. It is the case of the petitioner that subsequent to the said order there was an order under section 10 (5), section 12 and finally under section 18 of the Act. In pursuance of such steps taken by the Government, the petitioner, as stated above, got the lands allotted on 19th September, 1973. The third respondent, as the trustee of Govindadas Ganshyamdas Private Family Trust, preferred an appeal to the Land Tribunal, Tiruchirapalli, against the order of the Authorised Officer dated 28th April, 1972, contending that the Authorised Officer had not considered the objection statement filed by him and that he should be given option to declare the extent of lands to be retained by him. This appeal was filed under section 78 of the Act. Sub-sections (1) and (2) of section 78 of the Act read as follows:—

> "*Section* 78 (1):—Against any decision of the Authorised Officer under sections 9 (2) (*b*), 10 (3), (4) and (5), 16 (3) (*a*) (*iii*), 20, 22, 50 (4), 51 (1), (2), 52, 61 (3) (*b*) or 102 (2) (*b*), the Government may, within thirty days from the date of the decision and any person aggrieved by such decision may within sixty days from the date of such decision, appeal to the Land Tribunal".

> "*Section* 78 (2):—The Land Tribunal may admit an appeal presented after the expiration of the period mentioned in sub-section (1), but not exceeding thirty days, if it is satisfied that the party concerned had sufficient cause for not presenting it within the said period".

The Tribunal, after observing, "in the appeal the appellant (third respondent herein) has made an endorsement that he is willing to surrender some other lands as surplus instead of the lands chosen by the Authorised Officer as surplus; then once the appellant is found to own more than the ceiling area he should be given option to specify the lands to be retained by him and the surplus land which he desired to surrender; hence it is just and proper to remand the case to the lower Court to give opportunity to the appellant to specify the land to be taken as surplus from his holding", allowed the appeal by setting aside the order of the Authorised Officer and remanded the matter back to the Authorised Officer for fresh disposal.

2. It is seen from the records that the appeal was filed after a delay of more than one year and an application was also filed before the Land Tribunal to excuse the delay. From the facts of the case, it is also clear that the appeal was filed only in December, 1973 while the assignment in favour of the petitioner herein was made as early as on 19th September, 1973 and the order of the Authorised Officer is dated 28th April, 1972. Hence it is clear from the facts of the case that any re-alignment of the land will definitely affect the interests of the petitioner who has got a specific land assigned in his favour as per the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act and the Rules framed thereunder. Mr. Srinivasan, learned counsel appearing on behalf of the petitioner, apart from submitting that the petitioner is an interested party to agitate the matter by questioning the order of remand made by the Land Tribunal, contended that the Land Tribunal has absolutely no jurisdiction to entertain the appeal under section 78 of the Act filed by the third respondent herein since it was delayed by more than a year. Section 78 of the Act is clear, as regards the limitation for preferring such an appeal. Admittedly, the appeal was filed beyond the period of limitation fixed by section 78 and the same has been conceded by Mr. Rajappa, learned counsel appearing for the third respondent herein. Mr. Rajappa, learned counsel, contends that inasmuch as the Government is the aggrieved party as against the remand order passed by the Tribunal, the petitioner cannot be heard to say that the order of remand is invalid. According to the learned counsel the petitioner can have ample say when the matter is taken up by the Authorised Officer in pursuance of the remand order for the re-alignment of the standard acres to be retained by the landowner and the distribution of the excess lands in his hands. I do not think such an argument is availabe

to the third respondent herein, especially when the petitioner, who is interested in this matter, as stated above, questions the jurisdiction of the Tribunal to entertain the appeal which has vitally affected the assignment made in his favour. The chances of getting the very same land to be assigned to the petitioner cannot be a ground to ignore the contention of the petitioner when he questions the jurisdiction of the Tribunal to entertain the appeal, filed by the third respondent beyond the period of limitation. In my view, the Tribunal, without even considering the limitations imposed upon it by section 78 of the Act, has arrogated to itself the powers not vested in it. The excusing of the delay in preferring the appeal and ultimately passing an order on the said appeal, is arbitrary in nature and such an entertainment of the appeal in the teeth of section 78 of the said Act is an error apparent on the face of the record. All these points have been raised in the grounds of revision filed by the petitioner under Article 227 of the Constitution of India. It has been specifically stated by the petitioner that the Land Tribunal overlooked that the appeal before it was filed beyond the period of limitation prescribed under the Madras Land Reforms Act and the Tribunal had no jurisdiction to excuse the delay exceeding thirty days, that the Land Tribunal failed to note that the third respondent did not even file a revision petition against the final statement under section 12 which was made on 24th August, 1972, that the Land Tribunal overlooked that the publication under section 18 (3) was made in February, 1973 and further proceedings pursuant to the final notification was taken in April, 1973 itself, that the appeal filed by the third respondent against the order, under section 10 (3) is clearly beyond the period of limitation contemplated under section 78 of the Land Reforms Act, that the Land Tribunal ought to have taken into consideration that after the final notification under section 18 (3) proceedings under the Madras Land Reforms (Disposal of Surplus Lands) Rules, 1965 were taken and completed and the surplus lands were assigned to various individuals in accordance with the said Rules and that the Tribunal overlooked that the assignment order was made in favour of the petitioner on 19th September, 1973 and the petitioner had also deposited the instalments due as per the order of assignment long before the filing of the appeal by the landowner before the Land Tribunal.

Thus, taking all these points raised by the petitioner and also finding that the Tribunal had absolutely no power to entertain the appeal filed beyond the period of limitation, I am of the view that the order of the Tribunal must be set aside. Accordingly, the civil revision petition is allowed and the order of the Land Tribunal is set aside, with the result that the order of the Authorised Officer, over which the appeal was filed, is retained. There will be no order as to costs in this revision petition.

R.S. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, OCJ.* and *M. A. Sathar Sayeed, J.*

Venugopala Pillai .. *Appellant**

v.

Thayyanayaki Ammal and others .. *Respondents.*

(A) *Hindu Succession Act (XXX of 1956), section 14 (1) and (2)—Applicability—Test—Husband's will of 1921 conferring life estate on wife, and after her death to daughter and brother absolutely—Subsequent compromise between widow, daughter and brother with different provisions—Effect—Widow in possession of property as life-estate holder—Daughter's death in 1940—Adoption of son by widow in 1947—Husband's brother dying in 1963—Settlement deed and will by widow thereafter—Validity.*

(B) *Hindu Law—Widow's estate—Meaning, nature and incidents thereof.*

S, by his will dated 10th February, 1921 gave, a life-estate over the suit properties in favour of his wife *A* and after her death the properties were to be divided equally between his daughter *V* and his brother *B*. The will also provided and that if *V* died without leaving any issue, then *B* would be entitled to the properties. *B* propounded the will in a money suit brought by a creditor after the death of *S* against *A*, *V* and *B*. The suit was however dismissed. Subsequently, *A* and *V* filed a suit for a declaration that the will was a forgery. A compromise was entered into in the suit in 1924 providing *inter alia* that *A* should enjoy the properties for her life without power to alienate and after her *V* was to enjoy the properties for

*L. P. A. No. 79 of 1975. 17th May, 1978.

life, similarly. If *V* had male heirs they should take the properties absolutely but in case *V* died without male heirs, *B* should take the properties absolutely. *V* died issueless in 1940. *A* adopted the first defendant in 1947. *B* died in 1963. Thereafter *A* settled some of the properties and willed away some of the remaining properties in favour of the adopted son (first defendant). *A* died in 1966. The plaintiffs, as heirs of *B* filed a suit claiming entitlement to the properties in virtue of the compromise and questioning the legality of the settlement deed and will made by *A*, their specific contention being that the properties were possessed by *A* pursuant to the compromise as a widow's estate and was not enlarged into an absolute estate by reason of section 14 (1) of the Hindu Succession Act but fell within section 14 (2). The first defendant contended that the case fell directly within section 14 (1), that the widow's estate which *A* had in possession when the Act was passed became enlarged into an absolute estate enabling her to competently make the settlement deed and the will. Both the trial Judge and the first appellate Court considered that section 14 (1) applied and upheld both the settlement deed and the will. On second appeal, a single Judge of the High Court held that the source of *A*'s title was traceable for the first time to the compromise, that section 14 (2) applied extinguishing *A*'s title, to the suit properties on her death and that the settlement deed and the will she had made had no effect. On further appeal under the Letters Patent,

Held: The compromise had made marked departures from the will though it purported to be in consonance with it. Under the will *A* was given a life-estate after her *V* and *B* were conferred absolute rights; the compromise discarded the provision. Under the compromise two life-estates were created· one in favour of *A* and another in favour of *V* after *A*'s death. The will had not provided for relinquishment of rights by *B*; this was provided by the compromise. The will gave *V* an absolute estate over a moiety of the properties after *A*'s death. The compromise gave her only a limited estate without power of alienation. The compromise was a distinct deed arrived at between the members of a Hindu family under which a widow's established right as such widow to maintenance for life out of her husband's properties was recognised by a certain methodology or arrangement. [*Paras.* 10 & 11.]

The compromise was a reiteration and a declaration of a pre-existing right of a Hindu widow to succeed to her husband as a widow to take therein the widow's estate subject to the limitation or restriction ordinarily attached to it. [*Para.* 18.]

Section 14 (2) of the Hindu Succession Act is an exception to section 14 (1). Sub-section (2) applies to cases where possession is acquired for the first time by the female owner and not in assertion of or acceptance of a pre-existing right in her. The acid test is to find out whether under a given instrument the title is created in the widow for the first time or the entitlement in her is merely a restoration of a right which she possessed already under the Hindu Law. In the instant case, what was given to the widow under the compromise was in recognition of a vested right in her to hold the properties as the *persona* of her husband but as a widow's estate subject to the restriction ordinarily annexed thereto. The widow was possessed of the properties as on the date of the passing of the Act of 1956 and such properties should be deemed to be her absolute properties under section 14 (1). [*Paras.* 23 & 24.]

Meaning, nature and incidents of a widow's estate in Hindu Law set out.

[*Paras.* 14, 15, 16 & 17.]

Cases referred to:

V. Tulasamma v. *V. Sesha Reddi*, (1977) 3 S.C.C. 99: (1977) 2 A.P.L.J. (S.C.) 14: (1977) 3 S.C.R. 261: (1978) 1 S.C.J. 29: A.I.R. 1977 S.C. 1944; *Janaki Ammal* v. *Narayanaswami*, (1916) 43 I.A. 207: 4 L.W. 53: 31 M.L.J. 225: I.L.R. 39 Mad. 634: A.I.R. 1916 P.C. 117; *Badri Pershad* v. *Smt. Kansa Devi*, (1970) 2 S.C.J. 114: (1970) 2 S.C.R. 95: A.I.R. 1970 S.C. 1963; *B.B. Patil* v. *Gangabai*, A.I.R. 1972 Bom. 16.

Appeal under Clause 15 of the Letters Patent preferred against the judgment and the decree of Justice Mohan, passed in S. A. No. 814 of 1972 and dated 20th March, 1975 (A. S. No. 50 of 1968) on the file of the Court of the District Judge, South Arcot, Cuddalore—O. S. No. 61 of 1966 (Court of Subordinate Judge, Chidambaram).

M. R. Narayanaswami and *R. Vijayan*, for Appellant.

T. R. Ramachandran, *T. R. Rajagopalan* and *T. R. Rajaraman*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, OCJ.—The first defendant in O. S. No. 61 of 1966 on the file of the

Subordinate Judge, Chidambaram is the appellant. In order to appreciate the relevant facts in this Letters Patent Appeal, a summary of events that took place long long ago is necessary.

2. One Sarangapani Pillai married Arumbu Ammal and had a daughter Valliammai by name through her. Sarangapani had a brother Balakrishna by name. Under Exhibit A-1 dated 10th February, 1921, Sarangapani executed an unregistered Will conferring a life estate over the suit properties in favour of his wife Arumbu Ammal and after her death, his properties were to be divided equally between his daughter and his brother Balakrishna. The will also provided for a contingency that if Valliammai died without leaving any issue, then Balakrishna would be entitled to the entire properties. After the death of Sarangapani Pillai, one of his creditors filed a money suit against Arumbu Ammal, Valliammai and Balakrishna. Balakrishna having been impleaded as a party to that action, he propounded the will Exhibit A-1. Ultimately, the money suit was dismissed. During the pendency or at or about that time, Arumbu Ammal and her daughter Valliammai filed a suit O. S. No. 255 of 1923 in the Court of the District Munsif, Kattumannarkudi for a declaration that Exhibit A-1 was a forgery and the instrument would not alter the normal rights of succession to the estate of Sarangapani. In that suit, a compromise was entered into on the 24th of July, 1924 (Exhibit A-4). *Inter alia*, the compromise provided that Arumbu Ammal should enjoy the properties for her life as a widow's estate without any powers of alienation and aftar her, Valliammai should enjoy the properties for her life equally without any powers of alienation, and if there are any male heirs to Valliammai, they will take the properties absolutely: in case, however, Valliammai does not leave any male heir, Balakrishna should take the properties absolutely. Valliammai died issueless in the year, 1940 and Arumbu Ammal took the first defendant in adoption on 3rd November, 1947. Balakrishna died on January, 1963. Thereafter, under Exhibits B-2 and B-3, Arumbu Ammal settled some of the properties and willed away some of the remaining properties in favour of the first defendant and died on 16th May, 1966. On the death of Arumbu Ammal, the plaintiffs who are the heirs of Balakrishna filed the present action claiming their entitlement to the properties as under the compromise deed Exhibit A-4 read with Exhibit A-1 and questioned the legality and propriety of Arumbu Ammal's acts in having settled or testamentarily disposed of the properties under Exhibits B-2 and B-3. Their specific contention was that the estate which was in the possession of Arumbu Ammal as a widow's estate without any contemporaneous powers of alienation did not enlarge itself into an estate absolute by reason of section 14 (1) of the Hindu Succession Act, 1956.

2. This was resisted by the first defendant on various grounds amongst which the surviving contention which claims our attention is that under the compromise Exhibit A.4, Arumbu Ammal secured rights pursuant to her pre-existing right as a widow for being maintained for life from and out of the estate of her husband and in consequence, such an estate vested in her and it was admittedly in her possession on the date when Central Act XXX of 1956 was passed and it automatically enlarged itself into an absolute estate and, therefore, Exhibits B-2 and B-3 are valid instruments which Arumbu Ammal could execute during her lifetime.

3. Defendants 2 to 6 in the action are only tenants and we are not concerned with their rights which they claimed under the Tamil Nadu Cultivating Tenants' Protection Act.

4. On the above admitted facts, both the learned trial Judge as well as the first appellate Court, namely the District Judge of South Arcot at Cuddalore affirmed that the widow's estate secured by Arumbu Ammal under Exhibit A-4 was a limited estate which became enlarged into an absolute estate by virtue of section 14 (1) of Act XXX of 1956 and in that view, upheld both the settlement deed Exhibit B-2 and the Will Exhibit B-3 executed by Arumbu Ammal. They confirmed the title of the first defendant to the suit properties.

5. On a second appeal to this Court, Mohan, J., was of the view that what Arumbu Ammal secured under Exhibit A-4 was not in recognition of any pre-existing right but was the resultant of the creation of a new right and as the source of title is traceable for the first time to Exhibit A-4 alone, Arumbu Ammal cannot claim the benefits of section 14 (1) of the Hindu Succession Act; but on the other hand, her interest in the suit properties became extinguished by her death under section 14 (2) of the Act and, therefore the alienations made by her either by way of settlement or under Will are *non-est* and are to be ignored. In that

sense, the learned Judge allowed the appeal. It is as against this that the present Letters Patent Appeal has been filed.

6. Mr. M. R. Narayanaswami, the learned counsel for the appellant after taking us through the relevant provisions of the Hindu Succession Act contends that the rights secured by Arumbu Ammal under Exhibit A-4 are in recognition of a pre-existing right in her as a female member of a Hindu family and not created *inter vivos* for the first time by reason of the compromise arrangement under Exhibit A-4.

7. Relying upon the latest pronouncement of the Supreme Court in *V. Tulasamma* v. *V. Sesha Reddi*[1], in which the question has been exhaustively considered, the learned counsel would seek for a reversal of the judgment of the Single Judge of this Court.

8. Mr. T. R. Ramachandran, contending contra, by relying upon the literal explanation of the clauses in Exhibit A-4 which in turn refer to the will Exhibit A-1 and also to the widow's estate would strenuously contend that the learned Judge was right in having applied section 14 (2) of the Hindu Succession Act and in having rejected the plea that there is an enlargement of the limited extent held by Arumbu by reason of section 14 (1) of the Act.

9. We have already seen the terms of disposition under the will Exhibit A-1. It gave a life estate to Arumbu Ammal and after her life, the daughter Valliammai and brother Balakrishna were to take over the estate as absolute owners in equal moiety, but in the event of Valliammai dying without any male issue the entire properties would devolve absolutely on Balakrishna. Under the compromise Exhibit A-4 which has been analysed by the learned Judge, the following state of affairs springs therefrom: (1) The compromise is in accordance with the provisions of the will since the compromise makes a reference to it and says that it is in pursuance thereof. (2) The compromise conferred on Arumbu a life estate without powers of alienation. (3) Balakrishna relinquished his rights made available under the will after the lifetime of Arumbu. (4) Valliammal is made a remaindermen after the death of her mother but without any powers of alienation. (5) In the event of the daughter dying without male issue, Balakrishna would take the properties absolutely.

10. From a resume of the above recitals, it is clear that Exhibit A-4 makes a significant departure from the recitals in the Will though it purports to be in consonance with it. Under the will, Arumbu was given a life estate and after her, the daughter Valliammal and brother Balakrishna were conferred with absolute rights. Under the compromise, however, this provision is given a go-by. Two life estates are created, one in favour of Arumbu Ammal and another in favour of Valliammai after the death of Arumbu Ammal. Under Exhibit A-1 no provision was made for the relinquishment of the rights of Balakrishna. This is provided for in Exhibit A-4. Under Exhibit A-1 Valliammai gets an absolute estate over a moiety of the properties after the lifetime of Arumbu, but whereas under Exhibit A-4, Valliammal is only given a limited estate without powers of alienation. It only conferred on her the rights of enjoyment of properties without any powers of alienation. The contingency of Balakrishna getting a right over the entirety of the properties in the absence of male issue for Valliammai is common in both. We are not here called upon to consider the feasibility and enforceability of a provision which would restrict an earlier conferment of an absolute estate by providing a later restriction thereto. When once an absolute estate as of right is created under an instrument and it takes effect on a certain event, then normally a dent on the quality of that right by a laterly imposed restriction in the very same instrument would not ordinarily be effective in the eye of law. We are not, however, resting our contention on this observation. We have, pointed out that even though Exhibit A-4 purports to be in consonance with or a follow-up of Exhibit A-1, it does not appear to be so as there has been a complete overhauling of the nature of the dispositions, of the content of entitlements during the period at which such entitlements could be claimed by the parties to the compromise Exhibit A-4.

11. If therefore, Exhibit A-4, is a distinct deed arrived at between the members of a Hindu family under which a widow's established right as such widow to maintenance for life and enjoyment for life of her husband's properties is recognised by a certain methodology or arrangement, then the question

1. (1977) 3 S.C.C. 99: (1977) 2 A.P.L.J. (S.C.) 14: (1977) 3 S.C.R. 261: (1978) 1 S.C.J. 29: A.I.R. 1977 S.C. 1944.

that immediately arises for consideration is whether the conferment of such a right of enjoyment for life, otherwise known as a limited estate or a widow's estate could be held to be a right created for the first time in favour of Arumbu or is it a right conferred on her in recognition of a pre-existing right.

12. Before the law of inheritance for Hindus was codified under Act XXX of 1956, we had the Hindu Women's Rights to Property Act, 1937 wherein also the legitimate rights of the female members of a Hindu family were given momentous recognition. Such rights in the march of law thought of by our Legislature ever since 1937 which culminated in the renaissance in the matter of succession under the Hindu Succession Act are all pointers to the beneficial intention and object of our Parliament that the rights of a female ought not to be lightly brushed aside on technical and *a priori* considerations but should be given due recognition in accordance with the intentions of law complied with the forcible and well-intentioned mandates by our ancient Hindu commentators while dealing with a Hindu female.

13. If the background of such strides made in the matter of the improvement of the quality of rights of a female in a Hindu family is borne in mind, then it is not difficult to analyse and understand the import of Exhibit A-4. We have already seen that Exhibit A-4, though *prima facie* purports to follow Exhibit A-1, it does not. It makes a marked departure from the recitals in Exhibit A-1 and created, as it were, new entitlements not thought of under Exhibit A-1. It is, however, pertinent to point out that under Exhibit A-1, Arumbu Ammal is given a widow's estate over her husband's properties Could this arrangement referred to in Exhibit A-4 be taken as the source of title of Arumbu Ammal to the properties or should it in the conspectus of events and in the circumstances of the case be taken as the recognition of a pre-existing right?

14. What is a widow's estate? It is not an estate for life, or in tail, or in fee, referred to in British jurisprudence. Having regard to the sacramental bondage which would always knit a marriage tie amongst Hindus, a widow was expected to preserve unsullied the bed of her lord, and abide with her venerable protector to enjoy with moderation the property until her death and allow the heirs to take it after her (Katyayana). Such an inherence in the quality of her right was thought of by the ancient lawgivers since it was always the objective of the personal law of Hindus that a widow who had no male child should not be given an absolute and complete title over her husband's properties after his death. The Privy Council in *Janaki Ammal* v. *Narayanaswami*[1], observed:

> "Her (widow's) right is of the nature of a right of property; her position is that of owner: her powers in that character are however limited".

15. In another case, the learned law-lords while dealing with the same aspect again reiterated the position and stated:

> "The whole estate is for the time being vested in her absolutely for some purposes, though in some respects for only a qualified interest".

16. The interdict of alienation of such properties in the hands of a widow is not absolute. She has powers of alienation. She could alienate for religious purposes. She could part with the corpus for performing pilgrimages and other pious acts conducive to the spiritual welfare of her husband provided the expenditure is reasonable. She could expend for her own maintenance and for the marriage expenses of her female heirs. Thus, on serious and sufficient grounds which could compendiously come within the meaning of the expression "necessity", the widow had the right to alienate the properties in her possession and which were being enjoyed by her as a widow's estate.

17. So long as she is alive, no one has any vested interest in the succession. Thus, a widow's estate or a woman's estate is a special and a qualified estate which recognises her absolute right over the properties for her life subject, however, to the restrictions contemplated in the personal law and her power of alienation.

18. In the light of the meaning which has always been attributed to the technical expression "widow's estate or woman's estate", is the mere fact that under Exhibit A-4 such a right to which Arumbu was entitled to was conferred on her for the first time under Exhibit A-4, or created primarily thereunder? In

1. (1916) 43 I.A 207: 4 L.W. 53: 31 M.L.J. 225: I.L.R. 39 Mad. 634: A.I.R. 1916 P.C. 117.

our view, it is a reiteration and a declaration of a pre-existing right of a Hindu widow to succeed to her husband as a widow to take therein a widow's estate subject to the limitation and restriction referred to above.

19. In an illuminating judgment recently given by the Supreme Court in which Fazl Ali, J., spoke for the Bench, the position is made very clear. It is reported in *V. Tulasamma* v. *Sesha Reddi*[1]. No doubt, in that case, the grant was in lieu of maintenance. This right of maintenance when looked at from the ancient concept from which sprang the significance of the divine tie of marriage, it is easy to conclude that the wife is said to be a half of the husband. Even our Gods are propitiated by that name, for example, Ardhanareeswara. The learned Judge quoted Colebrooke and accepted the well-known principle that under the Hindu Law, the husband has got a personal obligation to maintain his wife and if he is possessed of properties, then his wife is entitled as of right to be maintained out of such properties. The claim of a Hindu widow to be maintained is not an empty formality which is to be exercised as a matter of concession or indulgence, grace or gratis or generosity but is a valuable spiritual and moral right which flows from the spiritual and temporal relationship of the husband and wife. As the wife is in a sense a part of the body of her husband, she becomes co-owner of the property of her husband though in a subordinate sense.

20. After careful consideration and detailed analysis of the case law and the Sastraic Hindu Law, Fazl Ali, J., in the above Supreme Court decision came to the following conclusions: (*a*) though the widow's right to maintenance is not a right to property but it is undoubtedly a pre-existing right in property, *i.e.*, it is a *jus ad rem* not *jus in rem* and it can be enforced by the widow who can get a charge created for her maintenance on the property, and (*b*) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu Law long before the passing of the Act of 1937 or the Act of 1946, and is, therefore, a pre-existing right.

21. The learned Judge went on to say:

"37. In the light of the above decisions of this Court the following principles appear to be clear:

1. (1977) 3 S.C.R. 261: A.I.R. 1977 S.C. 1944.

(1) that the provisions of section 14 of the 1956 Act must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times;

(2) it is manifestly clear that sub-section (2) of section 14 does not refer to any transfer which merely recognises a pre-existing right without creating or conferring a new title on the widow. This was clearly held by this Court in *Badri Pershad's case*[1].

(3) that the Act of 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly supplied a long felt need and tried to do away with the invidious distinction between a Hindu male and female in matters of intestate succession;

(4) that sub-section (2) of section 14 is merely a proviso to sub-section (1) of section 14 and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision.

....

44. Thus the following propositions emerge from a detailed discussion of the case:

(1) that the widow's claim to maintenance is undoubtedly a tangible right though not an absolute right to property so as to become a fresh source of title. The claim for maintenance can, however, be made a charge on the joint family properties, and even if the properties are sold with the notice of the said charge, the sold properties will be burdened with the claim for maintenance.

(2) that by virtue of the Hindu Women's Rights to Property Act, 1937, the claim of the widow to maintenance has been crystallised into a full-fledged right and any property allotted to her in lieu of maintenance becomes property to which she has a limited interest which by virtue of the provisions of Act of 1956 is enlarged into an absolute title.

(3) Section 14 (2) applies only to cases where the grant is not in lieu of maintenance

1. (1970) 2 S.C.J. 114: (1970) 2 S.C.R. 95: A.I.R. 1970 S.C. 1963.

or in recognition of pre-existing rights but confers a fresh right or title for the first time and while conferring the said title certain restrictions are placed by the grant or transfer. Where, however, the grant is merely in recognition or in implementation of a pre-existing right to claim maintenance, the case falls beyond the purview of section 14 (2) and comes squarely within the *Explanation* to section 14 (1) ......"

22. The Supreme Court in the above case approved *in toto* the ratio of the Bombay High Court in *B.B. Patil* v. *Gangabai.*[1] That was a case where an arbitrator passed an award which resulted in a decree under the Arbitration Act. It was pursuant to the award the widow secured certain properties of her husband for life and which were intended for her maintenance. The widow continued to be in possession of those properties till 25th February, 1967. The question arose as to what was the nature of the right which the widow obtained in those circumstances. The Supreme Court approved of the following passage in the Bombay decision:

> "In other words, sub-section (1) read with this *Explanation* provides that any property, *howsoever acquired and in possession* of a Hindu female after the commencement of the Act shall be held by her as a full owner in all cases where she formerly held merely limited ownership ...... By this enactment (Act of 1956) her rights are enlarged and wherever under the Hindu law she would merely obtain limited ownership she would, after the commencement of the Act, obtain full ownership".

Section 14 (1) and (2) runs as follows:

> "......(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> *Explanation*....In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property".

23. It is by now well-established that section 14 (2) is an exception to section 14 (1). Under section 14 (1), any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. Sub-section (2) would apply in cases where such a possession is made for the first time by the female Hindu and not in assertion of or in acceptance of a pre-existing right in her. The *Explanation* contemplates the case where the property is acquired by a Hindu female either by inheritance or at a partition ....or *in any other manner whatsoever*.

24 The acid test, therefore, is to find whether under a given instrument the title is created in the widow for the first time or the entitlement in her is merely a restoration of a right which she possessed already under the Hindu Law. The fact that under the compromise Exhibit A-4, she was given a widow's estate does not improve matters because she had that right and she could proclaim that right as a pre-existing right. In all fairness and having regard to the beneficial legislation introduced by our Parliament in 1956 to improve the conditions of a female heir under the personal law, it cannot still be maintained that what was given to Arumbu under Exhibit A-4 was by way of a dole or a generous gesture on the part of Balakrishna; but it should be held that it was in recognition of a vested right in her to hold the properties as the *persona* of her husband but as a widow's estate subject to the restriction ordinarily annexed thereto. No doubt, the phrase 'in any other manner whatsoever' referred to in the *Explanation* to section 14 (1) cannot be made elastic, so as to render nugatory sub-section (2) of section 14. Each case has to be decided on its own merits. If it could be clinchingly found that the vesting is as a result of a contract and not in due recognition of or in due obeisance to a pre-existing right, then such a contract might in such peculiar circumstances be viewed as one which is the source of title to the widow But in the instant case, we are unable to agree with Mohan, J., that it was only under Exhibit A-4 the title was created in the widow. The use

1. A.I.R. 1972 Bom. 16.

of the words 'widow's estate' in Exhibit A-4 is significant. Apart from it, Exhibits A-4 and A-1 are not similar in many respects. Therefore, if under the compromise what was given to the widow cannot be said to slope from the arrangement entered into between the parties but it was only in recognition of a pre-existing right, then the ratio of the decision of the Supreme Court in *V. Tulasamma* v. *Sesha Reddi*[1], squarely applies to the facts of this case and it should be held that Arumbu was possessed of those properties as on the date of the passing of the Act of 1956 and such properties acquired by her no doubt under the compromise Exhibit A-4 should be deemed to be her absolute properties as under section 14 (1), she shall hold it as full owner thereof and not as a limited owner. We are unable, therefore, to agree with the conclusion of the learned Judge in the second appeal. We set aside the judgment of this Court in S.A. No. 814 of 1972 and restore that of the appellate Court which in turn affirmed that of the trial Court. The suit is therefore, dismissed.

25. This appeal is, therefore, allowed with costs.

R.S —— *Appeal allowed.*

1. (1977) 3 S.C.R. 261: (1978) 1 S.C.J. 29: A.I.R. 1977 S.C. 1944.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and G. Ramanujam, J.*

C.K. Ramaswamy, Secretary to Government, Legislative Council Department, Madras-9 .. *Appellant* *

v.

G. Vasantha Pal and another .. *Respondents.*

(A) *Constitution of India* (1950), *Articles* 188, 193, 154, 1,63,361—*Election of petitioner to Legislative Council—Election notified in the Gazette,—Petitioner approaching appellant to make and subscribe before the Governor or some person appointed an oath or affirmation—'A' appointed* pro-tem *Chairman of the Council—Notification as to oath or affirmation of the duly elected members to be made before* 'A'—*Petitioner expressing inability and sending objection to the Governor to take oath before* 'A'—*Governor permitting petitioner to take oath before him—Petitioner intimating accordingly to* 'A'—*Objection by* 'A'—*Petitioner informing Governor and enclosing a subscribed oath for himself—Request to Governor to accept the oath —Petitioner whether duly elected member and entitled to sign the roll and take part in the business of the Council.*

(B) *Constitution of India* (1950), *Article* 226—*Declaratory relief—Whether can be given in writ proceedings—Appeal by Secretary to Council against grant of declaration — Maintainability.*

The Secretary to the Legislative Council is statutorily enjoined to see that all formalities mandated by law are satisfied before a duly elected member can sit in the Council to participate in public debates. The Secretary cannot be a silent member to such participation by the member if, in his view, it was in the teeth of Article 188 of the Constitution. Inasmuch as the facts in the instant case had an impact on the exercise and performance of the powers and duties of the Governor, the case whether the writ petitioner had acquired the legal status to participate in the deliberations of the Council being the subject-matter of the instant appeal can only be brought to the portals of the appellate Court by the Secretary to the Council and the appeal is therefore competent. [*Para.* 4.]

Under Article 188 every member of the Legislative Assembly or the Legislative Council of

*W. A. No. 365 of 1978 and C.M.P. No. 7991 of 1978. *29th August*, 1978.

State shall, before taking his seat, make and subscribe before the Governor or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule. The form prescribed read with Article 188 does mandate the member to make and subscribe the oath before the Governor or some person appointed in that behalf by him. This is not a case in which the oath is administered by the Governor as is provided for under Article 164 (3) of the Constitution where the Governor is enjoined to administer to the Ministers the oath of office and secrecy. The fabric of the process of making or subscribing the oath under Article 188 is a mandate directed against the Member of a Legislative Council of a State. The making or subscription to the oath is only a prop to an event which has already been declared in law under the Representation of the People Act. Under section 74 of the Representation of the People Act the petitioner has become a Member of the Legislative Council and his term of office as such Member had begun on and from 21st April, 1978, as contained in the provision of section 157 of the Representation of the People Act. Yet an additional statutory formality is required in order to impress on the duly elected member that he will bear true faith and allegiance to the Constitution of India as by law established and that he will uphold the sovereignty and integrity of India besides faithfully discharging the duties upon which he was about to enter. The solemnity and gravity of the situation, therefore, rest upon the individual-member in making the oath before the Governor. He would also suffer a penalty if he sits or votes as a Member of the Legislative Council before taking the oath under the Article. These wasps in the fabric of the process contemplated in Article 188 of the Constitution . no doubt, envisage a situation that the oath should be made and subscribed in the presence of the Governor. If however in a particular situation, such making or subscribing before the Governor becomes impossible or the person, who is to abide by such prescription is placed in a situation that he is not able to make or subscribe such an oath before the Governor, the question is whether he is at all material times helpless. If the option is with the Member to be ready and willing to make and subscribe the oath before the Governor or his nominee, then the question arises whether notwithstanding the use of the preposition 'before' in Article 188 such making and subcription could be done in an alternative manner provided such an adopted alternative is a reasonable but substantial substitute of the intendment of the mandate in Article 188. [*Para.* 8.]

As per Article 188 either the Governor himself or his nominee has to witness the oath-taking by the Members of the Assembly or of the Council.

If the said function of the Governor or his nominee has to be done under advice of his Council of Ministers it may happen that the Council of Ministers may advise the Governor not to function under the Article either by himself or through his nominee, and the Governor acting on such advice may refuse to function. The result will be members of the Assembly and the Council who have to take the oath before the Governor or his nominee on pain of being punished under Article 193 cannot obey the constitutional mandate that they must take the oath before taking their seat in the Assembly or the Council, as the case may be. In these circumstances, the Governor cannot refuse to function under Article 188 on the ground that the Council of Ministers has advised him not to act thereunder. Article 188 merely provides for a ministerial act to be done by the Governor and in doing such a ministerial act which he is enjoined to do under the Constitution the Governor is not acting on the advice of the Council of Ministers. No option or discretion is given to the Governor in witnessing the oath-taking by Members. Nor any decision by the Governor is involved in witnessing such oath-taking. Only in cases where an executive action is to be taken by the Governor, the question of his acting on the advice of his Council of Ministers or in his discretion will arise. When no decision by the Governor is involved and when he has no discretion in doing a particular act referred to in the Constitution, he does only a ministerial act and not an executive act under Article 163. Witnessing of the oath-taking by the Governor cannot in any sense be an executive function which is to be done by him on the advice of his Council of Ministers. [*Para.* 10.]

It is no doubt true that, under the Business Rules and Secretariat Instructions issued by the Government of Tamil Nadu, in all cases where a Secretary in a Department has to submit papers to the Governor, he shall submit them only through the Minister or Ministers concerned and the Chief Minister, he being a Secretary to the Government. But that does not mean the Governor has to act as per the advice of the Ministers even in respect of ministerial acts which he is bound to do under the Constitution. Hence when the appellant

as such Secretary forwarded the material papers in this case to the Ministers concerned so as to apprise them of the request of the member to take oath before the Governor, that act of his should not be understood as a reference made by him to the Council of Ministers for their advice which he could transmit ultimately, as he did in this case, to the Governor. As long as it is reasonable in the instant case to opine that a constitutional function exercised by the Governor as the repository of the executive power of the State, does not come within the purview of Article 163 of the Constitution, and so long as it is not a power which under the Constitution he is required to exercise in his discretion, then a third modality under which the Governor might act could easily be comprehended by reason of the language of Article 163 (2) itself. The provision in clause (2) as Article 163 being a general one is not necessarily confined to the cases mentioned in the first part of the clause namely, those, "where a question arises whether any matter is or is not one in respect of which the Governor is required to act in his discretion". There is, therefore scope for the Governor to act in a third direction which may not squarely fall within acts done by him or which ought to be done by him in consultation with the Council of Ministers, or acts or functions done or exercised by him in his discretion. [*Para.* 12.]

Article 188 requires every Member of the Legislative Assembly or the Legislative Council of a State to "make and subscribe, before the Governor or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule". Article 193 says that, if a person sits or votes as a Member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of Article 188, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees. Article 193 makes the intention of the Parliament quite clear, that the requirements of Article 188 should be complied with before a person wants to exercise his privileges and powers as a Member of the Legislative Assembly or the Legislative Council. There cannot, therefore, be any dispute that Article 188 is mandatory and that its compliance should be taken to be a condition precedent before a person chooses to sit and vote as a Member of the Legislature of a State. It is not in dispute that Article 188 had not been strictly complied with by the writ-petitioner taking the oath before the Governor. [*Para.* 16.]

One of the requirements under Article 188 is the presence of the person making and subscribing the oath before the Governor or the nominee at the time of making or subscribing the oath. But, if the appellant had made it impossible for the 1st respondent to make an oral affirmation before the Governor, then it can be assumed he (1st respondent) was prevented from appearing before the Governor in person for making or subscribing the oath before him, and the physical appearance of the first respondent before the Governor was made impossible by the appellant. It should therefore be taken that in the circumstances it was not possible for the first respondent to ensure his presence before the Governor for the purpose of making and subscribing the oath. Only then the first respondent subscribed the oath in the form prescribed and sent it to the Governor by post. At this stage, a distinction has to be made between cases where the Governor is to administer the oath and cases where the oath has to be taken by the person himself before the Governor. If the Governor is to administer the oath, then any other person administering the oath cannot be a compliance with the provision at all, but, where the party himself has to make and subscribe the oath before the Governor and it is found that it was not possible for him to go before the Governor for making and subscribing the oath in view of the stand taken by the appellant or the Government that the first respondent has to make and subscribe the oath only before the nominee and not before the Governor, strict compliance cannot be insisted, when every possible effort had been taken by the first respondent to ensure his presence before the Governor for making and subscribing the oath before him and when all those attempts failed, he had sent the form duly subscribed to the Governor. If the distinction between administration of oath to a person by the Governor and the oath being taken by the party himself before the Governor is borne in mind, the physical presence of the party before the Governor can be said to be merely directory. [*Para.* 22.]

The function of the Governor under Article 188 is not an executive act done on the "aid and advice" of the Council of Ministers. The immunity against answerability to any Court under Articles 163 and 361 is available only in respect of functions he has to perform on the "aid and advice" of the Council of

Ministers or a function which he could exercise in his discretion. [*Para.* 25.]

Whatever steps the petitioner could take for making and subscribing the oath before the Governor, he has taken, but it is because of circumstances beyond his control, he could not take the oath orally in the presence of the Governor, and had to subscribe the oath in the prescribed form and send it to the Governor. When his presence before the Governor has been made impossible by the appellant or the Government in view of their stand that the oath can be subscribed only before the *pro tem* chairman, while in fact the Governor had also the concurrent power under Article 188, the first respondent can invoke the principle of substantial compliance. Even in the letter enclosing the requisite form duly subscribed the first respondent offered to appear before the Governor to orally take the oath. Since the Governor had not called upon him to take the oath orally before him, the first respondent could assume that the form subscribed and sent by post had been accepted by the Governor. In the peculiar facts and circumstances of the case, therefore, the writ-petitioner should be taken to have substantially complied with Article 188 so as to enable him to sit in the Council as its member. It is well-established by now, that in exercise of the powers under Article 32 or 226 the Courts are not fettered by the procedure and technicalities of the Writs in English Law and the jurisdiction of our Courts is wide enough even to make a declaratory order, if that is the proper relief to be given to the aggrieved party. [*Paras.* 23 *and* 26.]

Cases referred to:—

K.A. Mathialagan v. *The Governor of Tamil Nadu*, (1973) 1 M.L.J. 131: 86 L.W. 340: A.I.R. 1973 Mad. 198 (F.B.); *Shamsher Singh* v. *State of Punjab*, A.I.R. 1974 S.C. 2192; *Ramiah* v. *Chief Secretary, Government of Madras*, I.L.R. (1950) Mad. 167: (1949) 2 M.L.J. 61: 62 L.W. 473: A.I.R. 1950 Mad. 100; *Huth* v. *Clarks*, 25 Q.B.D. 391; *Godavari S. Parulekar* v. *State of Maharashtra*, (1966) 2 S.C.J. 716: (1966) M.L.J. (Crl.) 797: A.I.R. 1966 S.C. 1404; *Vijari Ram* v. *Nathalal*, (1970) 1 S.C.J. 546: (1969) 2 S.C.R. 627: A.I.R. 1970 S.C 765; *Shabber* v. *State*, I.L.R. (1964) 1 All. 620: *Kochunni* v. *State of Madras*, 1959 S.C.J. 858: (1959) 2 An. W.R. (S.C.) 70: (1959) 2 M.L.J. (S.C.) 70: (1959) 2 S.C.R. (Supp.) 316: A.I.R. 1959 S.C. 725.

W. A. No. 365 *of* 1978. — Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice V. Ramaswami dated 5th July, 1978, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1574 of 1978 presented under Article 226 of the Constitution of India to issue a writ of declaration, declaring that the petitioner having performed the obligation himself before the Governor on 22nd April, 1978, to subscribe to the oath as required by Article 188 of the Constitution of India and having further informed the Secretary Legislative Council, by his letter of 22nd April, 1978, to make the necessary arrangements for the making of the oath and subscription thereof before the Governor and having further on 27th April, 1978, subscribed in writing to the oath as prescribed in Schedule III of the Constitution and sent the same in duplicate to the Governor, offering to follow it up, if necessary, by making the oath in person has performed all the obligations under Article 188 of the Constitution and he is entitled to take his seat in the Legislative Council as duly elected member from the Madras District Graduates' Constituency, without any further obligations on his part.

C.M.P. No. 7991 *of* 1978:—Petition prescribed to the High Court to dismiss the Writ Appeal No 365 of 1978 on a preliminary ground that (1) the appellant is not aggrieved by the declaration made by the High Court in favour of the first respondent / petitioner (2) that even so, having obstructed the taking of the oath by the first respondent / petitioner before the Governor cannot be heard to complain against the order of Court, that in the circumstances, the first respondent / petitioner has substantially complied with the provisions of Article 188; (3) that the first respondent / petitioner having signed the Roll of Members, it is not open to the appellant to attack a Member's status as a legislator, and indulge in shadow boxing or academic arguments.

The Government Pleader for Appellant.

Respondent in person.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—The Secretary to the Government, Legislative Council Department, Madras, feeling aggrieved by the order of V. Ramaswami, J. in W.P. No. 1574 of 1978, has presented this writ appeal canvassing the correctness of the view of the learned judge that Mr. G. Vasantha Pai, the petitioner in the writ petition shall be deemed to have substantially complied with the provisions in Article 188 of the Constitution of India and that he is entitled to sign the roll of Members of the Council and take the seat in the Tamil Nadu

Legislative Council as a duly elected member from the Madras District Graduates' Constituency without any further obligation on his part. The writ petitioner sought for a writ in the nature of a declaration declaring him as having performed his obligation by presenting himself before the Governor on 22nd April, 1978, to subscribe to the oath as required by Article 188 of the Constitution and having further informed the appellant by his letter dated 22nd April, 1978, to make the necessary arrangements for the making of the oath and subscription thereof before the Governor and having further on 27th April, 1978, subscribed in writing to the oath as prescribed in Schedule III of the Constitution and sent the same in duplicate to the Governor, offering to follow it up, it necessary, by making the oath in person, has performed all his obligations under Article 188 of the Constitution and is entitled to take his seat in the Legislative Council as duly elected member. The writ petitioner was declared to have been elected under section 66 of the Representation of the People Act. By a notification dated 15th of April, 1978, under rule 84 (1) of the Conduct of Election Rules, Mr. Vasantha Pai, the writ petitioner was duly declared to have been elected to fill in one of the seats in the Tamil Nadu Legislative Council, from the Madras District Graduates' Constituency. By a notification issued on 21st April, 1978, the election of the petitioner was notified in the Gazette. Mr. Pai, therefore, became a Member of the Council on and from 21st April, 1978, as per section 157 of the Representation of the People Act. The writ petitioner however in order to complete the process of the election to enable him to take his seat, was contacting the appellant so as to make and subscribe before the Governor or some person appointed in that behalf by him an oath or affirmation according to the form set out for the purpose in the third schedule to the Constitution. On 19th April, 1978, Thiru K.S. Abdul Wahab, who was appointed as a *pro tem* Chairman of the Council as that office by then fell vacant, was appointed by the Governor under Article 188 of the Constitution as the person before whom the oath or affirmation may be made by the duly elected Members. The notification for the above purpose was made on 20th April, 1978, and the appellant caused such information to be transmitted to the duly elected Members. The writ petitioner consequent upon the above public information presented himself before the Governor and expressed his inability and indeed an objection of his to take such an oath before Thiru Abdul Wahab. According to the writ petitioner Thiru Abdul Wahab's stand earlier in the Council wherein he urged the then Chief Minister to follow the example of Mujibur Rehman in the event of the Government of India not conceding his demands, was extremely shocking and unconstitutional to him, and he, therefore, expressed his personal wish not to be asked to make and subscribe the oath as required before Thiru Abdul Wahab. The case of the petitioner is that the Governor informed him that though his objections were sentimental, he would however permit him to make the oath provided the appellant could place all the necessary papers before him and arrange for the formal swearing. According to the writ petitioner, he contacted the appellant, informed him of his interview with the Governor, also gave him in writing as to what transpired. He also requested the appellant, in consequence to make the necessary arrangements to enable him to make and subscribe to the oath before the Governor by the 23rd of April, 1978 so that he could sit in the House and participate in the election of the regular Chairman which was scheduled to be held on the 25th of April, 1978. He secured only an interim reply from the appellant which was to the effect that his letter was under consideration. Thereafter on the 23rd April, 1978, the writ petitioner sent a wire to the Governor which reads as follows:—

> "Presented myself twenty second for taking oath under Article 188. As directed moved Secretary, Council place papers before you. No Intimation. Please administer oath before 10 A.M. 24th lest I be disqualified under Article 193. *Vasantha Pai, M.L.C.*".

This was followed by letter on the 24th to the Governor whereby he repeated his earlier request to the Governor to enable him to make and subscribe to the oath as requested so as to enable him to discharge his duties as a public functionary. The appellant in his subsequent letters to the writ-petitioner expressed that it was not possible to comply with the petitioner's request, as he had every opportunity to take the oath before the *pro tem* Chairman. The writ-petitioner was placed in such an unenviable position that notwithstanding the notification of the regular Chairman and Deputy Chairman to the Council made on 26th April, 1978 and notwithstanding also of the fact that the Chairman and Deputy Chairman have been duly nominated by the Governor as persons before whom the elected Members to the Council may take their oath under Article 188, wrote to the Governor on 27th April, 1978 enclosing a made and subscribed oath in the

prescribed form stating that he has made and subscribed the oath for himself and was sending the same to the Governor direct in view of the delay caused in its making under Article 188. According to the writ petitioner he has discharged all his obligations and referring to the earlier events which transpired and referred to already, he requested the Governor to accept the oath made and subscribed by him as sufficient under Article 188. He also expressed his desire and his readiness and willingness to present himself in person and read out the oath if necessary in person. The appellant however on 28th. April, 1978 consequent to the election of the Chairman and the Deputy Chairman to the Council and their nomination as the persons before any of whom the oath or affirmation may be made by the Members of the Legislative Council under the above Article, informed the petitioner about it and sought for information whether Mr. Pai would take the oath or affirmation as a Member before the duly elected Chairman so that he can fix a time for the purpose. The writ petitioner's stand was that he having earlier done what was expected of him in law and under the Constitution, he was entitled to sign the roll of Members of the House and take part in the conduct of the business of the Council. He filed the present writ petition to establish that stand.

2. It is common ground that after the writ petition has been allowed by this Court, the petitioner was permitted by the appellant, pursuant to orders of this Court, to sign the roll and the record discloses this fact.

3. The learned Single Judge of this Court has briefly summarised the facts appearing on the record as under.

"1. The petitioner had presented himself in person before the Governor on 22nd April, 1978 and offered to take and subscribe to the oath in the form prescribed before the Governor.

2. The Governor was not unwilling on that day to permit the petitioner to make and subscribe to the oath before him if necessary arrangements could be made.

3. The Secretary to the Tamil Nadu Legislative Council, first respondent herein, by a letter of the petitioner dated 22nd April, 1978 was informed about the petitioner meeting the Governor, and his willingness to allow the petitioner to make his oath before him, and he was requested to make the necessary arrangements enabling the petitioner to make the oath before the Governor "by tomorrow the latest".

4. The Secretary failed to make the necessary arrangements and was taking an obstructive attitude in consultation with the authorities that he and the petitioner was prevented from taking and subscribing to the oath before the Governor.

5. The petitioner had already deposited the original of the declaration of his election as a Member of the Tamil Nadu Legislative Council from the Madras District Graduates Constituency with the Secretary of the Council on 22nd April, 1978 and even if there is any dispute on the fact of such deposit of declaration, there was no dispute that he was a duly elected Member from Madras District Graduates' Constituency in the election held on 9th April, 1978.

6. The petitioner was previously a Member of the Legislative Council for a long time and is a senior Member of the Bar. He has with full knowledge and understanding of the obligation, undertaking and implications of the breach thereof made and subscribed, to the oath in the form prescribed in the Third Schedule to the Constitution and sent the same to the Governor who is one of the authorities before whom the making and subscribing to the oath could be done.

7. There was no dispute that the oath sent to the Governor in duplicate was factually made and subscribed by the petitioner.

8. In his letter dated 27th April, 1978 enclosing the oath duly signed in duplicate to the Governor, he had referred to the circumstances under which he had to make and subscribe to the oath, not before any particular authority, but by himself and had stated: "Should you, however, desire that I should call on you in person and read out my oath before, you, I shall be happy to do so if I am intimated the time and place for the purpose."

9. The petitioner had not received any requisition from the Governor calling upon him to appear in person and read out the oath before him.

10. In the affidavit filed in this Court and even in his arguments, the petitioner had signed the oath in the form prescribed in compliance with Article 188 and sent the same in duplicate to the Governor which would amount to an admission and conclusive proof of making and subscribing the

oath in the form prescribed in the Third Schedule to the Constitution."

4. When the appeal came up for hearing the writ petitioner raised a preliminary objection that the appeal was not maintainable, as the appellant is not a person aggrieved and that the Court of Appeal cannot interfere with his fulfledged status as a Member of the Council, he having subscribed to the register and having been permitted by the appellant to sign the same. This is not a case in which the appellant, can be said to be a person, who can be a silent witness to the participation of a Member in the Legislative Council, if in his view such participation is in the teeth of Article 188 of the Constitution. As the Secretary of the Legislative Council, he is statutorily enjoined to see that all formalities mandated by law are satisfied before a duly elected Member can sit in the Council to participate in public debates. Though, no doubt, such participation is visited with a penalty on the member who has not complied with the requirement of Article 188 and who attempts to sit and vote before compliance with the prescriptions therein, yet it cannot be said in the instant case that the issue which is material in this case is not alive for a further adjudication by the Court of appeal. The appellant wishes to point out that he allowed the member to sign the register in due obedience to the orders of the learned single Judge of this Court and such an entry into the record in the absence of a prior compliance with, according to him of the guideline set in Article 188, enables him to canvass the correctness of conclusion of the learned Judge in appeal so that the record could be corrected, if a different view was possible. The conspectus of facts earlier referred to do have an impact on the exercise and performance of the powers and duties of the Governor. Bearing in mind, the protection granted to the Governor under Article 361 of the Constitution that he shall not be answerable to any Court for such exercise of power or his case whether the petitioner has acquired the legal status to participate in the deliberations of the Council being the subject-matter of this appeal can only be brought to the portals of the appellate Court by the Secretary of the Council. We are, therefore, unable to uphold the preliminary objection that the writ appeal itself is not maintainable.

5. The learned Advocate-General for the appellant stressed before us the following contentions.

6. Firstly, he would say that the Governor's function under Article 188 is not one which is exercisable by him in his discretion, but is an act performed by him on the advice of the Council of Ministers and, therefore, the Governor having acted on such advice and appointed his nominee it would be an executive act done by him within the meaning of Article 163 (2) of the Constitution of India and such an act cannot be called in question on the ground that the Governor ought to have acted in his discretion. In effect it is said that as the Governor while making the nomination under Article 188, has to act on the advice of his Ministers, the resultant of that act is unquestionable. Secondly, it is said that Mr. Pai not having made or subscribed to the oath in the manner contemplated under Article 188, he cannot be said to have complied with its terms, and in the alternative it is said that a substantial compliance of the intendment of Article 188, is not a valid substitute for proof of compliance and in that sense the doctrine of substantial compliance accepted by the learned Judge cannot be sustained.

7. Contending contra Mr. Pai, appearing in person would say that even assuming that the Governor's delegation of powers or functions under Article 188, is wholesome and complete, the choice of making and subscribing the oath either before the Governor or his nominee is always with the elected member and in the peculiar circumstances of this case, it should be said that he has, in law and in spirit, substantially complied with the mandates as entered in Article 188. Mr. Pai, would not accept that the Governor while acting under Article 188 is exercising an executive function which necessarily involves consultation with the Council of Ministers. He would also say that it is a peculiar function exercised by the Governor which cannot be characterised to be one performed in his discretion. Viewed in this light, he would say that the Governor was only expected to be instructed and informed of the making and subscribing of the oath and that having been done in this case, there is such substantial compliance as found by the learned single Judge.

8. Before dealing with the contention of the learned Advocate-General that the Governor exercises an executive act, when he performs his duties under Article 188 of the Constitution, let us consider the scope of Article 188. The language of Article 188 makes it clear that every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor or some person appointed in that behalf by him, an oath or affirmation according

to the form set out for the purpose in the Third Schedule. The form prescribed read with Article 188, of the Constitution does mandate the Member to make and subscribe the oath before the Governor or some person appointed in that behalf by him. We shall, of course, consider the question as to what is the impact and scope of the parenthesis which is an alternative to such making and subscription of the oath before the Governor, that is, the making thereof before some person appointed in that behalf by him in the later portion of our Judgment. On a fair reading of the provision, it appears that the making and subscription of the oath should be in front of the Governor. This is not a case in which the oath is administered by the Governor as is provided for under Article 164 (3) of the Constitution where the Governor is enjoined to administer to the Ministers the oath of office and of secrecy. The fabric of the process of making or subscribing the oath under Article 188, is a mandate directed against the member of a Legislative Council of a State. The making or subscription to the oath is only a prop to an event which has already been declared in law under the Representation of the People Act. Under section 74 of the Representation of the People Act the petitioner has become a member of the Legislative Council and his term of office as such member had begun on and from 21st of April, 1978, as contained in the provision of section 157 of the Representation of the People Act. Yet an additional statutory formality is required in order to impress on the duly elected member that he will bear true faith and allegiance to the Constitution of India as by law established and that he will uphold the sovereignty and integrity of India besides faithfully discharging the duties upon which he was about to enter. The additional notional safeguard is intended to infuse in the mind of the Member who is to make and subscribe the oath that he has certain extraordinary responsibilities other than the faithful discharge of his duties as an elected representative. The solemnity and gravity of the situation, therefore, rest upon the individual-member in making the oath before the Governor. He would also suffer a penalty if he sits or votes as a Member of the Legislative Council before taking the oath under the Article. These, wasps in the fabric of the process contemplated in Article 188 of the Constitution, no doubt, envisage a situation that the oath should be made and subscribed in the presence of the Governor. If however in a particular situation such making or subscribing before the Governor becomes impossible or the person, who is to abide by such prescription is placed in a situation that he is not able to make or subscribe such an oath before the Governor, the question is whether he is at all material times helpless. This is, of course, subject to the discussion to follow whether the Member has a choice in the matter or the oath has to be compulsively taken only before the person appointed in that behalf by the Governor. If for reasons hereinafter to be stated, it appears to us as it did to the learned single Judge also that the option is with the Member to be ready and willing to make and subscribe the oath before the Governor or his nominee, then the question arises that notwithstanding the use of the preposition 'before' in Article 188 whether such making and subscription could be done in an alternative manner provided such an adopted alternative is a reasonable but substantial substitute of the intendment of the mandate in Article 188. Though our conclusion on this aspect that the making of the oath should be in front of the Governor, yet it is a matter to be considered hereafter whether if such an oath is made and subscribed in a given set of circumstances which would amount to substantial compliance of the constitutional norm in Article 188 whether it would be sufficient.

9. At this stage it is convenient to consider the question whether the Governor's act or function under Article 188 of the Constitution results in an act compelling him to consult the Council of Ministers under Article 163, or is it an act performed within his discretion, or is it a function which does not fall squarely within the above two specified compartments of exercise of power. In a Full Bench decision of our Court, in *K.A. Mathialagan* v. *The Governor of Tamil Nadu*[1], while dealing exhaustively with the powers of the Governor under the Constitution and after having noted the dichotomy in the exercise of such power, when he has to act in consultation with the Council of Ministers and at other times when he can act in the exercise of his discretion, the Court said:

"Historically therefore when in the Government of India Act, 1935, before its adaptation, functions of the Governor-General or the Governor were referred to specifically which they were expressly required to exercise in their discretion, and a similar

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1. (1973) 1 M.L.J. 131: 86 L.W. 340: A.I.R. 1973 Mad. 198 (F.B.).

exception finds a place in Article 163 (1) it is reasonable to take the view that the exception has reference only to those functions of the Governor which he is expressly required by or under the Constitution to exercise in his discretion and that has reference only to the two instances of functions of the Governor in Schedule Six to the Constitution".

10. In *Shamsher Singh* v. *State of Punjab*[1], the Supreme Court held that the Governor acts on the aid and advice of the Council of Ministers while performing an executive action and that even where the Governor has to act in his discretion *i.e.*, on his own judgment, he has to act in harmony with his Council of Ministers. It is true, in the decisions referred to above, it was held that except in cases where the Governor is to act under the Constitution in his discretion, in all other cases he has to act on the aid and advice of the Council of Ministers. But we are not concerned in this case with any decision which the Governor has to take with the aid and advice of his Council of Ministers Nor are we concerned with any discretionary functions of the Governor where he has to act on his own judgment. We are here concerned only with certain specified functions of the Governor which is more or less ministerial and which he is enjoined to do under the Constitution. Article 188 enables a Member to take oath before the Governor or any person appointed by him in that behalf. As per the Article either the Governor himself or his nominee has to witness the oath-taking by the Members of the Assembly or of the Council. If the said function of the Governor or his nominee has to be done under advice of his Council of Ministers it may happen that the Council of Ministers may advise the Governor not to function under the Article either by himself or - through his nominee, and the Governor acting on such advice may refuse to function. The result will be the members of the Assembly and the Council who have to take the oath before the Governor or his nominee on pain of being punished under Article 193 cannot obey the constitutional mandate that they must take the oath before taking their seat in the Assembly or the Council, as the case may be. In these circumstances, the Governor cannot refuse to function under Article 188 on the ground that the Council of Ministers has advised him not to act thereunder. Article 188 merely provides for a ministerial act to be done by the Governor and in doing such a ministerial act which he is enjoined to do under the Constitution the Governor is not acting on the advice of the Council of Ministers. No option or discretion is given to the Governor in witnessing the oath-taking by Members. Nor any decision by the Governor is involved in witnessing such oath-taking. Only in cases where an executive action is to be taken by the Governor, the question of his action on the advice of his Council of Ministers or in his discretion will arise. When no decision by the Governor is involved and when he has no discretion in doing a particular act referred to in the Constitution, he does only a ministerial act and not an executive Act under Article 163. Witnessing of the oath-taking by the Governor cannot in any sense be an executive function which is to be done by him on the advice of his Council of Ministers.

11. A discretionary power is normally conferred by words, but as pointed out by Halsbury's Laws of England, Fourth Edition (Hailsham), paragraph 28.

> "A duty unaccompanied by any discretion requires action is a prescribed manner and form to be taken when the conditions precedent exist; performance of such a duty is a mere ministerial act".

On a reading of Article 188 of the Constitution we are unable to cull out therefrom any compulsive obligation on the part of the Governor to act on the advice of the Council of Ministers in the matter of the nomination of alternative members to be authorised persons before whom the contemplated oath may be made or subscribed or in the matter of witnessing the making and subscribing of the oath himself.

12. It is no doubt true that, under the Business Rules and Secretariat Instructions issued by the Government of Tamil Nadu, in all cases where a Secretary in a Department has to submit papers to the Governor, he shall submit them only through the Minister or Ministers concerned and the Chief Minister, he being a Secretary to the Government. But that does not mean the Governor has to act as per the advice of the Ministers even in respect of ministerial acts which he is bound to do under the Constitution. On such an understanding of the situation, when the appellant as such

1. A.I.R. 1974 S.C. 2192.

Secretary forwarded the material papers in this case to the Ministers concerned so as to apprise them of the request of the member to take oath before the Governor, that act of his should not be understood as a reference made by him to the Council of Ministers for their advice which he could transmit ultimately as he did in this case to the Governor. As long as it is reasonable in the instant case to opine that a constitutional function exercised by the Governor as the repository of the Executive power of the State, does not come within the purview of Article 163 of the Constitution, and so long as it is not a power which under the Constitution he is required to exercise in his discretion, then a third modality under which the Governor might act could easily be comprehended by reason of the language of Article 163 (2) itself. The provision in clause (2) of Article 163 being a general one is not necessarily confined to the cases mentioned in the first part of the clause, namely, those "Where a question arises whether any matter is or is not one in respect of which the Governor is required to act in his discretion". There is, therefore scope for the Governor to act in a third direction which may not squarely fall within acts done by him or which ought to be done by him in consultation with the Council of Ministers, or acts or functions, done or exercised by him in his discretion. It is in this light that the observation in Halsbury referred to above, that such a performance of duty can be a ministerial act, has to be understood. Whatever may be the caption under which the subject could be dealt with, we are of the view that the exercise of power by the Governor for the specified purpose of nominating a delegate for vouching to the making and subscribing of the oath would be an act of his which slopes from the ordinary functions of the Governor as the head of the State and we are unable therefore to agree with the contention of the learned Advocate-General that the function of the Governor under Article 188 is not an act of his performed in his discretion, but one in respect of which he is bound by the advice of the Council of Ministers, and that, as it transpires in this case, the Council of Ministers having advised him to nominate the present Speaker and the Deputy Speaker as the persons before whom the members may take oath, that would clinch the issue, and it is no more open to the member to exercise his choice of making such an oath before the Governor. Such a consultation, even if he had, would not exclude the power of the Governor as the delegator to accept such a making and subscribing of the oath, if circumstances compelled him so to do.

13. It is in this perspective that the question has to be considered, whether, on the facts and circumstances of the case, by the exercise of the choice, which, according to us and as hereafter explained, is still with the member to take the oath before the Governor in spite of the nomination by him, either by himself or in consultation with the Council of Ministers, there has been a substantial compliance with the constitutional prescription in Article 188 of the Constitution.

14. *Prima facie* Article 188 of the Constitution appears to provide for an absolute and mandatory prescription. Having regard to the fact that Article 193 imposes a penalty for not obeying Article 188, the latter Article should be taken to be absolute and mandatory and has to be strictly complied with. The words of Article 188 are imperative and Article 193, which makes non-compliance with Article 188 penal, should be taken to show the intention of the constitution-makers to have a rigid compliance with Article 188 before one sits as a member. As pointed out in "Craies on Statute Law," at page 262:

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of a Court of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered".

15. However, the Courts have followed the practice of sanctioning the evasion or disregard of statute by treating them as merely directory and sometimes it has been carried beyond the line of sound discretion. This is based on the fact that strict compliance with all the minute details, which modern statutes contain, is impossible owing to the practical inconveniences likely to result from it and, therefore, the Courts with a view to free the latter from the reproach of harshness or absurdity are tempted not to enforce strictly all the provisions contained in statutes, but treat them as being merely directory. It is no doubt true that constitutional provisions are generally mandatory. But, having regard to the object with which the constitutional provision is made, it can sometimes be treated as merely directory. A constitutional provision, that writs and processes

shall run in the name of the State or be under its seal, has been considered directory, although generally constitutional provisions are considered mandatory. (*Jump* v. *M Clurg*, 35 Mo. 193) (Vide—Footnote at page 535 of Crawford on Constitution). Whether the Legislature intended to create an imperative duty or allow a discretion in the matter depends upon the nature, objects and the construction of the statute itself. It is also well-established that there is a strong line of distinction between cases, where the prescriptions of the statute affect the performance of a duty, and where they relate to a privilege or power. Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred and it is therefore probable that such was the intention of the Legislature.

16. Article 188 of the Constitution requires every member of the Legislative Assembly or the Legislative Council of a State to "make and subscribe, before the Governor or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule". Article 193 says that, if a person sits or votes as a Member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of Article 188, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees. Article 193 makes the intention of the Parliament quite clear, that the requirements of Article 188 should be complied with before a person wants to exercise his privileges and powers as a member of the Legislative Assembly or the Legislative Council. There cannot, therefore, be any dispute that Article 188 is mandatory and that its compliance should be taken to be a condition precedent before a person chooses to sit and vote as a member of the Legislature of a State. It is not in dispute that Article 188 had not been strictly complied with by the writ petitioner taking the oath before the Governor. Therefore, the only question is whether in the circumstances of the case the writ petitioner can be taken to have substantially complied with Article 188 of the Constitution. The writ petitioner's case that on 22nd April, 1978 there were two authorities before whom he can make and subscribe the oath or affirmation according to the requisite form, one the Governor and the other his nominee, Mr. Abdul Wahab, the *pro-tem* Chairman, that as his conscience did not permit him to make and subscribe the oath or affirmation before the *pro-tem* Chairman, whose idealogy and political ideas are quite different from his, he decided to make and subscribe the oath before the Governor, that on being approached by him the Governor expressed his willingness to permit his to make and subscribe the oath or affirmation before him, provided the necessary papers and registers were brought before him by the Legislature Secretariat, that on seeing the appellant to be a stumbling block between him and the Governor, he had no other alternative except to make and subscribe the oath himself according to the forms and sent it by post to the Governor and that in these circumstances he should be taken to have substantially complied with Article 188.

17. According to the learned Advocate-General however, once the Governor had appointed a nominee under Article 188, the oath cannot be made or subscribed before the Governor. It was also contended by the learned Advocate-General that, even if the Governor can function under Article 188, after he had appointed a nominee, still the option rests with the Governor either to exercise the power or not, and it is not open to a party to insist on the Governor exercising the power under Article 188. This contention of the Advocate-General, however, overlooked the language in Article 188 which uses the words "before the Governor some person appointed in that behalf by him." The language of Article 188 seems to suggest that both the Governor as well as the person nominated by him in that behalf can act under Article 188 and allow the oath to be made and subscribed before them.

18. According to the language of Article 188, the principle laid down in the decision in *Huth* v. *Clarke*[1], will squarely apply. The principle laid down in that case was that an authority, who delegates its powers to another, does not denude himself of his powers and that the delegation does not imply parting with powers by a person who grants the delegation. According to this decision, the person delegating can also exercise the powers even while the delegation subsists, provided that the person delegating remains responsible for the action of the delegate, if any, done as a delegate. In

1. 25 Q.B.D. 391.

Ramiah v. *Chief Secretary, Government of Madras*[1], a Division Bench of this Court followed the principle in *Huth* v. *Clarke*[2], and held that delegation does not imply a denudation of power or authority. In that case it was held that, though the power to pass an order of detention under section 2 (1) of the Maintenance of Public Order Act, 1947, had been delegated to the District Magistrates and Commissioner of Police by the State Government, the State Government can also pass an order of detention in spite of the delegation. On similar facts the Supreme Court also held in *Godavari S. Parulekar* v. *State of Maharashtra*[3], that, even though the State Government had delegated the power conferred on it under rule 30 of the Defence of India Rules to all the District Magistrates in the State, they cannot thereby denude themselves of the powers to act under the rule, and that they would be competent to act under the rules even after they had delegated the powers thereunder to the competent authority. The following observation of Willis, J. in *Huth* v. *Clarke*[2], has been cited with approval by the Supreme Court in that case:

> "Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."

19. Halsbury's Laws of England, Vol. I, 4th Edition, paragraph 32 (Page 34) says:

> "In general a delegation of power does not imply parting with authority. The delegating body will retain not only the power to revoke the grant, but also the power to act concurrently on matters within the area of delegated authority *Huth* v. *Clarke*[2], except in so far as it may have already become bound by an act of its delegate,"

In the face of these authorities, it cannot be disputed that, notwithstanding the appointment of a nominee for the purpose of Article 188, the Governor can also act under Article 188 as he is not denuded of his powers under that Article. Therefore, the contention on behalf of the appellant that, once a nomination has been made for the purpose of Article 188 by the Governor, it is only the nominee who can act under Article 188 and not the Governor, cannot be accepted. The 1st respondent can, therefore, make and subscribe the oath in the requisite form either before the nominee or before the Governor. We have to, therefore, agree with the view taken by V. Ramaswami, J., in the order under appeal that both the Governor as well as his nominee can concurrently exercise jurisdiction under Article 188.

20. The question then is, if two authorities are available, before whom the oath can be made, who is to make the choice. According to the first respondent, the choice is with him and he can go before any one authority to make and subscribe the oath. Since he was not inclined to make and subscribe the oath or affirmation before the *pro-tem* Chairman, he approached the Governor, and, according to him, the Governor was willing to permit the first respondent to make and subscribe the oath before him, provided the papers and registers were brought to him, but, as the papers and registers were not made available at the appointed time by the appellant, the 1st respondent had no other choice except to subscribe the oath in the required form and send it to the Governor by post, and this should be taken to be a substantial compliance of Article 188.

21. The learned Advocate-General would, however, say that, when at least one functionary is avaliable and willing to do its duty no question of applying the principle of substantial compliance will arise, that in any event, the physical presence before the authority for the purpose of making and subscribing the oath being an essential requirement, the same cannot be dispensed with on any account, and that therefore no question of substantial compliance with Article 188, without there being physical presence, would arise.

22. It is true one of the requirements under Article 188 is presence of the person making and subscribing the oath before the Governor or the nominee at the time of making or subscribing the oath. But, if the appellant had made it impossible for the first respondent to make an oral affirmation before the Governor, then it can be assumed he (first respondent) was prevented from appearing before the Governor in person for making or subscribing the oath before him. Physical appearance of the first respondent before the Governor was made impossible by the appellant. It should

1. I.L.R. (1950) Mad. 167: (1949) 2 M.L.J. 61: 62 L.W. 473: A.I.R. 1950 Mad. 100.

2. 25 Q.B.D. 391.

3. (1966) 2 S.C.J. 716: (1966) M.L.J. (Crl.) 747: A.I.R. 1966 S.C. 1404.

therefore be taken that in the circumstances it was not possible for the first respondent to ensure his presence before the Governor for the purpose of making and subscribing the oath. Only when he found that he cannot go before the Governor to make and subscribe the oath the first respondent subscribed the oath in the form prescribed and sent it to him by post. At this stage, a distinction has to be made between cases where the Governor is to administer the oath and cases where the oath has to be taken by the person himself before the Governor. If the Governor is to administer the oath, then any other person administering the oath cannot be a compliance with the provision at all, but, where the party himself has to make and subscribe the oath before the Governor and it is found that it was not possible for the first respondent to go before the Governor for making and subscribing the oath in view of the stand taken by the appellant or the Government that the first respondent has to make and subscribe the oath only before the nominee and not before the Governor, strict compliance cannot be insisted, when every possible effort had been taken by the first respondent to ensure his presence before the Governor for making and subscribing the oath before him and when all those attempts failed, he had sent the form duly subscribed to the Governor. If the distinction between administration of oath to a person by the Governor and the oath being taken by the party himself before the Governor is borne in mind, the physical presence of the party before the Governor can be said to be merely directory. In these circumstances, we are of the opinion that the principle of substantial compliance can be invoked by the first respondent. As a matter of fact, it has been held by the Supreme Court, in *Vijri Ram* v. *Nathalal*[1], that non-compliance with the provisions of a statute or Constitution will not necessarily render a proceeding invalid, if by considering its nature, its design and the consequences which follow from its non-observance one is not led to the conclusion that the Legislature or the constitution-makers intended that there should be no departure from the strict words used. In that case the form of oath in Gujarati language made and subscribed by a member of the Gujarat State Legislative Assembly under Article 173 of the Constitution contained a slight deviation from the form prescribed in English. The Supreme Court, notwithstanding the defect in the form actually subscribed by the member, held that, as the essential requirements of the oath given in the form in the Third Schedule were not deviated from the petitioner should be taken to have made and affirmed the oath substantially in accordance with Article 173. In this case the theory of substantial compliance has been accepted by the Supreme Court in the matter of making and affirming the oath under Article 173. In *Shabbir* v. *State*[1], the principle of substantial compliance has been applied to the making and subscribing of oath by a Judge of the High Court under Article 219 of the Constitution. In that case it was specifically found that the general authorisation given by the Governor to the Chief Justice under Article 219 was bad and that there should have been a specific authorisation with reference to the persons who were to take oath before the Chief Justice. It was also found that the form of oath taken by the Judge was not the correct form. The Court held that, notwithstanding these irregularities the oath taken in that case was not vitiated. An oath made and subscribed before a person who had not been duly authorised under Article 219, was held to be not vitiated on the ground that there was substantial compliance with Article 219. We cannot see any reason as to why the principle of these decisions will not apply to this case. If the theory of substantial compliance can be invoked even in respect of a requirement prescribed in a constitutional provision, such as Article 188, then the only question is whether the first respondent has made out a case for invoking the principles of substantial compliance.

23. As already stated, whatever steps he could take for making and subscribing the oath before the Governor, he has taken, but it is because of circumstances beyond his control, he could not take the oath orally in the presence of the Governor and had to subscribe the oath in the prescribed form and send it to the Governor When his presence before the Governor has been made impossible by the appellant or the Government in view of their stand that the oath can be subscribed only before the *Pro-tem* Chairman, while in fact the Governor had also the concurrent power under Article 188, the first respondent can invoke the principle of substantial compliance. Even in the letter enclosing the requisite form duly

1. (1970) 1 S.C.J. 546: (1969) 2 S.C.R. 627: A.I.R. 1970 S.C. 765.

1. I.L.R. (1964) 1 All. 620.

subscribed the first respondent offers to appear before the Governor to orally take the oath. Since the Governor has not called upon him to take the oath orally before him, the first respondent can assume that the form subscribed and sent by post had been accepted by him. In the peculiar facts and circumstances of the case, therefore, the writ petitioner should be taken to have substantially complied with Article 188 of the Constitution so as to enable him to sit in the Council as its member.

24. Two further contentions advanced by the Advocate-General remain to be considered: (*i*) Article 361 is a bar to the writ petition and the said bar cannot be overcome by suitably framing the prayer; and (*ii*) the declaratory relief as sought for by the writ petition cannot be given under Article 226 of the Constitution.

25. As regards the question as to whether the writ petitioner is barred under Article 361, it is to be noted that the writ petitioner is not asking for relief against the Governor or calling in question any act of the Governor. His complaint is that though the Governor was willing to witness his oath-taking the appellant prevented the Governor from doing so and that by his conduct the appellant made it impossible for him to comply strictly with the provisions of Article 188. We have already held that the function of the Governor under Article 188 is not an executive act done on the 'aid and advice' of the Council of Ministers. We cannot therefore agree with the learned Advocate - General that by virtue of Articles 163 and 361 the exercise of the discretion by the Governor by directing the writ petitioner to go before the person appointed by him under Article 188 could not be questioned in a Court of law, either directly or indirectly. We are also inclined to agree with Ramaswami, J. that a combined reading of Articles 154, 163 and 361 would indicate that the immunity against answerability to any Court is in respect of functions which he is bound to perform on the 'aid and advice' of the Council of Ministers or a function which he could exercise in his discretion.

26. As regards the contention that a declaratory relief cannot be granted in a writ petition and that such a relief could be granted only in a suit, it is well established by now, that in exercise of the powers under Article 32 or 226 the Courts are not fettered by the procedure and technicalities of the Writs in English law and the jurisdiction of our Courts is wide enough even to make a declaratory order, if that is the proper relief to be given to the aggrieved party Vide *Kochunni* v *State of Madras*[1], C.K Allen in his book on "Law and Orders", III Edn. at page 227 says that declaration as a form of action is neither supervisory, like the prerogative orders, nor appellate, though it partakes of the nature of both forms of remedy, that the action is peculiar in form, since it is not usually a *lis inter partes* enforceable by execution and that it merely declares rights and liabilities on existing state of facts. As page 229 the author says:—

> "Decisions of non-statutory and even statutory tribunals are subject to declaration whether or nor (semble) other remedies are available; except that when legislation has prescribed a complete course of procedure, litigation and appeal, recourse cannot be had to declaration in addition. A question of status, *e g.*, nationality or of members of the House of Commons or of a local authority may be established by declaration."

27. In this case the petitioner has been elected a member of the Council and his right as such member is likely to be affected or infringed by the stand taken by the appellant that he had not taken the oath strictly under Article 188 He therefore approached this Court and sought a writ in the nature of a declaration that as he had substantially complied with Article 188, he is entitled to take his seat in the Legislative Council as a duly elected member from the Madras District Graduates Constituency without any further obligation on his part. In such circumstances the Court is not debarred from giving a declaratory relief it appears necessary in order to meet the ends of justice.

28. In the view we have taken that the Governor has concurrent powers to witness the oath-taking under Article 188 even after an appointment of his nominee, it is unnecessary to deal with the question raised by the writ-petitioner as to whether the appointment of the Chairman and the Deputy Chairman of the Council as nominees by G.O. Ms. No 27, Legislative Council dated 28th April, 1978 is invalid for the reason that it lacks specificity as required by that Article.

29. For the foregoing reasons we see no ground for sustaining this Writ Appeal. The Writ Appeal is therefore dismissed. There will, however, be no order as to costs.

R.S. ——— *Appeal dismissed.*

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1 1959 S.C J. 818: (1959) 2 An.W.R (S.C) 70: (1959) 2 M L J. (S C.) 70: (1959) 2 S.C.R. (Supp.) 316: A.I.R. 1959 S.C. 725.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Ramaprasada Rao CJ.* and *G. Ramanujam, J.*

Krishnaswamy Reddiar .. *Appellant**

v.

Muthu Reddiar .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 105 (2) —*Remand by Appellate Court to lower Court—No appeal against the order of remand—Finding becoming final—Party aggrieved precluded from disputing its correctness*

Held: Order 43, rule 1 (*u*), Civil Procedure Code, has provided for an appeal against an order under rule 23 of Order 41 remanding a case, where an appeal would lie from the decree of the appellate Court. Therefore the appellant herein should have filed an appeal against the order of remand passed by the appellate Court, if he was aggreived against the findings rendered in the remit order. The appellant not having appealed against the suit remand order, the bar under section 105 (2) comes into operation and the appellant is precluded from disputing its correctness in the subsequent stages of the same proceedings. The finality given under section 105 (2) to an order of remand which is appealable but which has not in fact been appealed against will apply to the findings rendered in the order of remand as well. [*Paras.* 8 *and* 11.]

Cases referred to:

Jasraj Inder Singh v. *Hemraj Multanchand*, (1977) 2 S.C.R. 973: A.I.R. 1977 S.C. 1011; *Lonan Kutty* v. *Thomman*, 1976 S.C.R. (Suppl.) 74: A.I.R. 1976 S.C. 1645; *Sita Ram* v. *Sukhandi*, (1972) 1 S.C.R. 836: A.I.R. 1972 S.C. 1612.

Appeal under Clause 15 of the Letters Patent against the order of Mohan, J., dated 29th September, 1975 and made in the exercise of the Appellate Jurisdiction of the High Court in A. No. 142 of 1973 (P) preferred to the High Court against the decree of the Principal District Judge, Pondicherry, dated 31st March, 1978 in O.S. No. 5 of 1972.

K. Venkataswami and *R. Gandhi*, for Appellant.

V. Sridevan, *G. Masilamani* and *R. Balachander*, for Respondent.

The Judgment of the Court was delivered by

Ramanujam, J:—This Letters Patent Appeal is directed against the Judgment of Mohan, J. dismissing of A.S. No. 142 of 1973 (Pondicherry), preferred against the judgment and decree in O.S. No. 5 of 1972 on the file of the Principal District Judge, Pondicherry.

2. The suit properties originally belonged to one Thirumalai Reddiar of Thirubuvanai in Pondicherry State. He had five daughters and one son. One of his daughters is one Kumudavalli who was married in 1930 to one Venkatakrishna Redddiar of Kanjanur in Gingy Taluk within the State of Tamil Nadu. Thirumalai Reddiar by a deed dated 27th June, 1933, donated the suit porperties to his daughter, Kumudavalli. Kumudavalli died issueless on 23rd January, 1941 leaving behind her husband, Venkatakrishna Reddiar. Andalammal, one of the sisters of Kumudavalli, claiming that she is the heir of Kumudavalli, sold the suit properties to one Krishnaswami Reddiar on 16th May, 1960. Coming to know of the said sale by Andalammal, Venkatakrishna Reddiar claiming to be the sole heir of Kumudavalli had in his turn sold the properties to one Muthu Reddiar on 19th March, 1962.

3. Subsequent to his purchase, Muthu Reddiar filed a suit in the Court of first instance under French Procedure by assignation dated 19th July, 1962 for a declaration of his title to the properties and possession against Krishnaswami Reddiar and Andalammal. Muthu Reddiar's case in his suit was that Kumudavalli. the original owner of the property, having been a Hindu residing within the French territory, on her death in the year 1941 the properties devolved only upon her husband under the customary law applicable to Hindus in French Territory and that, therefore, Venkatakrishna Reddiar had validly sold the properties to him. The case of defendants 1 and 2, Krishnaswami Reddiar and Andalammal, was that Kumudavalli ceased to be a French National and became an Indian National as a result of her marriage with an Indian citizen and therefore her properties situate in French territory were subject to French Law relating to foreigners and not by the customary Hindu law as alleged by Muthu Reddiar.

4. The Court of the first instance held that Kumudavalli had lost her French Nationality on her marriage with Venkatakrishna Reddiar, an Indian national, by the application of Article 19 of Code Civil as modified by law dated 2nd June, 1889, that consequently Kumudavalli's estate should be governed by the French Law as embodied in Article 3 (*ii*)

*L.P.A. No. 91 of 1975. 22nd September, 1978.

of Code Civil, that if the said Article is to govern the rights of parties, in relation to the suit properties Venkatakrishna Reddiar as husband of Kumudavalli cannot succeed to the properties and that in the absence of any descendants or ascendants to Kumudavalli, her sister, Andalammal became entitled to succeed to the properties. In this view the suit came to be dismissed.

5. There was an appeal to the District Court in A.S. No 34 of 1967. The appellate Court disagreed with the view taken by the Court of the first instance and held that even as per Article 19 of the Code Civil as modified from time to time Kumudavalli had not lost her status as a French subject even after marriage and that, therefore, the properties left by her should be governed only by the customary Hindu law applicable to Hindus in French territory. However in order to find out whether Kumudavalli's estate devolved upon her husband or upon her sister, under the customery Hindu Law the Appellate Court felt it necessary to have a finding on the form of marriage between Kumudavalli and Venkatakrishna Reddiar. According to the Appellate Court if the marriage had been performed in Brahma form the husband will be heir, and on the other hand, if the marriage had been performed in Asura form, Kumudavalli's sister will be the heir. As the trial Court did not give any finding on that aspect, the Appellate Court remitted the case to the trial Court for fresh disposal and permitted the parties to adduce evidence on that point.

6. After the remit order, the suit was re-numbered as O. S. No. 5 of 1972 and withdrawn from the file of the Sub-Court to the District Court and taken up for trial by the Principal District Judge. He framed the following three issues:

(1) Whether the marriage between Kumudavalli and Venkatakrishna Reddiar (vendor of the plaintiff) was in Brahma form and consequently he inherited the property from his wife?

(2) Whether the marriage was in Asura form and consequently her sister defendant No. 2 (vendor of the first defendant) inherited the property?

(3) To what relief is the plaintiff entitled?

The parties adduced oral and documentary evidence as regards the form of marriage between Kumudavalli and Venkatakrishna Reddiar. The trial Court, after analysing the evidence, held that the said marriage was in Brahma form and not in Asura form and that, therefore, Venkatakrishna Reddiar, alone inherited the suit properties after the death of his wife. In this view the trial Court decreed the plaintiff's suit. There was an appeal by Krishnaswamy Reddiar, the first defendant, before this Court in A.S No. 142 of 1973. In that appeal Mohan, J. upheld the findings of the trial Court that the marriage between Kumudavalli and Venkatakrishna Reddiar was in Brahma from and not in Asura Form, and consequently affirmed the judgment and decree of the trial Court.

7. Before us the learned counsel for the appellant seeks to challenge not only the findings given by the trial Court with reference to the form of marriage, but also the findings rendered by the Appellate Court prior to the remand, regarding the nationality of Kumudavalli after her marriage with Venkatakrishna Reddiar. According to the learned counsel for the appellant the Court of first instance Pondicherry, by its judgment dated 6th August, 1966 rightly held that Kumudavalli became a foreign national as a result of her marriage with an Indian citizen so far as the Pondicherry State is concerned, and therefore the properties left by her in Pondicherry at the time of her death should be treated as property of a foreign national, and if so treated, the sister of Kumudavalli who was a collateral was entitled to succeed to the properties in the absence of any descendants of Kumudavalli.

(8). The learned counsel for the respondent would however contend that the view taken by the Court of first instance that Kumudavalli lost her French nationality as a result of her marriage with an Indian national has rightly been set aside by the Appellate Court by its judgment dated 18th March, 1971 and that in any event the said finding having become final as a result of the defendant not having preferred any effective appeal against the remit order wherein that finding was given, it is no longer open to him to canvass the correctness of that finding. Mohan, J. has not dealt with this aspect of the matter. He only dealt with the question as to the form of marriage. He accepted the finding rendered by the Trial Court that the marriage was in Brahma form and not in Asura form On the question of the form of marriage, we are satisfied on a close scrutiny of evidence that the marriage was conducted in Brahma form and that if the personal law applicable to French nationals were

to apply Venkatakrishna Reddiar as the sole heir of Kumudavalli would succeed to her properties. Thus unless the appellant succeeds in setting aside the finding given by the appellate Court in the remand order at the earlier stage that Kumudavalli has not lost her French nationality as a result of her marriage to Venkatakrishna Reddiar, he cannot succeed to the properties. The question is whether the appellant can question the said finding rendered by the appellate Court in its remit order at the earlier stage in this appeal which arises out of the judgment rendered by the Trial Court after remand. We are of the view that section 105 (2) of the Code of Civil Procedure will stand in the way of the appellant questioning the correctness of those findings in this appeal. Section 105 (2) of the Code of Civil Procedure is as follows:

"Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

Order 43 rule 1 (u) has provided for an appeal against an order under rule 23 of Order 41 remanding a case, where an appeal would lie from the decree of the appellate Court. Therefore the appellant therein should have filed an appeal against the order of remand passed by the Appellate Court on 18th March, 1971, if he was aggrieved against the findings rendered in the remit order The appellant not having appealed against the said remit order the bar under section 105 (2) comes into operation and the appellant is precluded from disputing its correctness in the subsequent stages of the same proceedings. It is well-established that the finality given under section 105 (2) to an order of remand which is appealable but which has not in fact been appealed against, will apply to the findings rendered in the order of remand as well. In this case the remand was based on the finding that Kumudavalli had not lost her French nationality as a result of her marriage with an Indian national. That finding has become final. It is not, therefore, open to the appellant to question that finding in this appeal arising out of the said order of remand directing a fresh disposal of the suit after giving a finding on the form of the marriage alone.

9 The learned counsel for the appellant, however, relies on a decision in *Jasraj Indersingh* v *Hemraj Multanchand*[1] in support of his contention that notwithstanding the fact that the appellant has not filed an appeal against the order of remand passed by the District Judge dated 18th March, 1971, he is entitled to canvass the findings therein in the appeal before the High Court, as it is a Court superior to that of the District Court which passed the order of remand. In that case, there was an appeal to the Supreme Court against the judgment of the High Court Certain findings given by the High Court in a remand order at an earlier stage of the proceedings were questioned before the Supreme Court by the appellant It was argued by the respondent that the appellant cannot question such findings before the Supreme Court as they had become final and binding as between the parties. The Supreme Court held that the findings rendered by the High Court in its remit order at the earlier stage will bind the Sub Court as well as the High Court or any other Court of co-ordinate authority hearing the matter at a latter stage, but not the Supreme Court while it deals with an appeal from the High Court and that this was because the remit order of the High Court had been passed at an intermediary stage of the same litigation. Though at the first blush the decision appears to support the stand taken by the appellant, on a clear scrutiny we find that it cannot apply to the facts of this case. There, the remand order passed by the High Court at the earlier stage was not appealable to the Supreme Court under the provisions of the Code of Civil Procedure, and therefore, there was no question of the said remit order being challenged in an appeal before the Supreme Court at the earlier stage and of its acquiring finality under section 105 (2) of the Code. Therefore the principle contained in section 105 (2) of the Code will not apply. Perhaps it is for this reason the Supreme Court has held that as an appellate Court it is entitled to canvass the correctness of the finding rendered by the High Court at an earlier stage in the same litigation. This is obvious from the following observation of the Supreme Court:

"The appeal before the Supreme Court is from the suit as a whole and, therefore, the entire subject-matter is available for adjudication before us, *If on any other principle of finality statutorily conferred or on account of res-judicata attracted by a decision in an allied litigal*

1. (1977) 2 S.C.R. 973; A.I.R. 1977 S.C. 1011.

tion the matter is concluded, we too are bound in the Supreme Court. (the Italics is ours.) Otherwise the whole lis for the first time comes to this Court and the High Court's finding at an intermediate stage does not prevent examination of the position of law by this Court. Intermediate stages of the litigation and the orders passed at these stages have a provisional finality."

Thus the Supreme Court itself recognised the principle that if an order has become final as a result of the statutory provision or by the principle of *res judicata*, the finality cannot be reopened by an Appellate Court including the Supreme Court at the subsequent stages of the same litigation. Reference is also made to the decision in *Lenankutty* v. *Thonnan*[1] by the learned counsel for the appellant. That was also a case where the remand order was passed by the High Court and there was no automatic right of appeal against the remand order to the Supreme Court and, therefore, section 105 (2), Civil Procedure Code was not applicable

10. In *Sita Ram* v. *Sukhandi*[2] the scope of section 105 (2) was directly considered by the Supreme Court. In that case there was an order of remand made by the District Court in appeal from the decision of the trial Court. One of the questions raised before the District Court was as to whether the proceeding, out of which the appeal arose, was or was not barred by limitation. After holding that the period of limitation was to be computed from a particular date, a remand order was passed by the District Court. There was no appeal against the remand order but after the trial Court gave its finding on the merits of the rival claims in pursuance of the remand order, an appeal was preferred against that order to the District Court. That appeal having been dismissed, the matter was then taken in second appeal to the High Court. Before the High Court the findings rendered in the remit order by the District Court at the earlier stage on the question of limitation was challenged. The High Court went into the question and expressed an opinion as to from what date the period of limitation is to be computed and ultimately reversed the decrees of both the lower Courts. The matter was taken to the Supreme Court and it was urged before that Court that the High Court was in error in going behind the findings recorded in the remit order at the earlier stage, that the question as to from what date the period of limitation had to be computed having already been agitated and concluded by the remit order in the earlier appeal before the District Court, the correctness of that finding should not have been permitted to be raised over again. Dealing with the aspect as to whether the findings rendered in the remand order, which has not been appealed against even though an appeal is provided under the Code, could be challenged at a later stage of the proceedings at the appellate stage, the Supreme Court observed that the consequence of an omission to file an appeal against the order of remand which is appealable is indicated in section 105 (2) of the Code of Civil Procedure, that the remand order having been passed by the District Court on the basis of its finding on the question of limitation and that basis not having been challenged by filing an appeal against the remand order the party affected by that finding is precluded from disputing its correctness, that the High Court in such circumstances should have given due weight to the findings given in the order of remand, and that it had committed a very serious error in law in going behind those findings. The principle laid down in the said decision directly applies to the facts of this case.

11. As already stated, the remand order in this case was based on the finding rendered by the appellate Court that Kumudavalli has not lost her French nationality as a result of her marriage with an Indian National and that finding not having been challenged by the first defendant, he is precluded from questioning the correctness of that finding in view of section 105 (2) of the Code. We have already held that the form of marriage between Kumudavalli and her husband was in Brahma form and, therefore, the husband will succeed to the properties of Kumudavalli to the exclusion of her collaterals including the first defendant's vendor.

12. The Letters Patent Appeal therefore fails and is dismissed. No costs.

R.S. —— *Appeal dismissed.*

1. (1976) S.C.R. (Supp.) 174: A.I.R. 1976 S.C. 1645.
2. (1972) 1 S.C.R. 836: A.I.R. 1972 S.C. 1612.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

K. Khaja Muhaideen .. *Appellant**

v.

K. Muhaideen Batcha and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 11—Explanation I—Res judicata—*Two cross-suits between parties in Munsif's Court—One for injunction and the other for possession between the same parties—Subject-matter of both suits a tailoring business—Suits tried together Suit for injunction decreed—Suit for possession dismissed Appeal against the decree in injunction suit only Order in the suit for possession operates as* res judicata.

Where, as in the instant case, the subject-matter of the two cross-suits was precisely the same, namely, the conduct of the business of the tailoring mart, although the reliefs claimed in the two suits were, understandably, different, injunction being asked for in the one case and possession being asked for in the other, this difference, however, in the reliefs asked for, cannot make for any difference in the application of the rule of *res judicata* since in both the suits the question that was directly and substantially in issue was the same. An appeal in one of the suits only would be clearly barred under section 11 of the Civil Procedure Code. [*Para* 8.]

Cases referred to.

Koshal Pal v. *Mohanlal*, A.I.R. 1976 S.C. 688; *Sheosagar Singh* v. *Sitaram Singh*, (1897) 24 I.A. 50; *Pappammal* v. *Meenammal* (1943) 1 M L J. 1: 56 L.W. 12: 205 I.C. 618: A.I.R. 1943 Mad. 139.

Appeal against the decree of the Court of the Subordinate of Tirunelveli in Appeal Suit No. 413 of 1974, preferred against the decree of the Court of the District Munsif of Tirunelveli in Original Suit No. 629 of 1972.

Miss. O.K. Sridevi, for Appellant.

Raj and *Raj*, for Respondents.

The Court delivered the following.

JUDGMENT.—In the second appeal a question of *res judicata* is raised in the following circumstances:

2. There were two cross-suits between the same parties in the District Munsif's Court, Tirunelveli. One was for injunction. The other was for possession. The injunction suit O.S. No. 629 of 1972, was filed by one Khaja Moideen against three sons of a tailor called Kader Batcha. The suit for possession, O.S. No. 613 of 1973, was filed, as a counter blast, by the sons of Khader Batcha against Khaja Moideen. The subject-matter of both the suits was a tailoring business run in the name of "Star Tailoring Mart". Khaja Moideen claimed that this business exclusively belonged to him. Khader Batcha's sons, on the contrary, said that Khaja Moideen was only an erstwhile manager of the business. They claimed that there were the owners of the business by right of inheritance from their father. In his suit Khaja Moideen asked that Khader Batcha's sons be restrained by a permanent injunction from interfering with his running of the tailoring mart. In the other suit, Khader Batcha's sons asked for a decree directing Khader Moideen to deliver possession of the tailoring mart to them.

3. Both the suits were tried together by the learned District Munsif. Documents were marked in common. Oral evidence also was called in common. At the end of the joint trial, the District Munsif decreed the injunction suit of Khaja Moideen and dismissed the other cross suit for possession.

4. The sons of Khader Batcha appealed. They preferred, though only one appeal, A.S. No. 413 of 1974, which was an appeal against the decree in the injunction suit. They did not appeal against the decree dismissing their own suit for possession.

5. Before the Sub Court, Khaja Moideen raised an objection that the appeal in the injunction suit which was the one and only appeal between the parties, was barred by *res judicata*. It was contended that the other decree passed by the District Munsif, which the appellants had not appealed against, would operate as a bar to a decision in this appeal on merits The learned Subordinate Judge, however, held that there was no *res judicata* since both the decrees had been passed by the trial Court simultaneously under a common judgment after a joint trial. He then proceeded to entertain the appeal before him on the merits, and held, differing from the trial Court's finding that Khaja Moideen was not the owner of the tailoring mart.

6. In this second appeal brought by Khaja Moideen, Miss. Sridevi, his learned counsel, pleaded the bar of *res judicata*. She

*S.A. No. 95 of 1977. 21st July, 1978.

said that the Sub Court's decision now has brought about a kind of situation which was the very thing that section 11 of the Code of Civil Procedure meant to provide against. Learned counsel pointed out that with reference to one and the same subject-matter, namely, the ownership of the tailoring mart, there were now two conflicting decisions by two competent Courts, one holding that Khaja Moideen was entitled to run it and the other holding that he was not entitled. Learned counsel further submitted that although the decision in the two suits was simultaneous in the Court of first instance, the decree which was not carried in appeal become final between the parties, and, by the same token, it came to assume the position of a decree passed in a former suit within the meaning of the *Explanation* I to section 11 of the Code.

7. Miss Sridevi, cited, among other decisions, *Koshal Pal* v. *Mohanlal*[1]. In that case a plea of *res judicata* was raised at the stage of ultimate appeal before the Supreme Court. The judgment under appeal in that case was a common judgment of a High Court by which two second appeals had been disposed of. There were, accordingly, two decrees. But the appellant before the Supreme Court had filed only one appeal against one of the two decrees of the High Court. In these events, the respondent before the Supreme Court raised the plea of *res judicata*. The Supreme Court upheld this objection and dismissed the appeal before them without going into the merits. In the course of their judgment, the Supreme Court marked a distinction between the position that obtained in the High Court where two second appeals were disposed of together by a common judgment and the position that later obtained in the Supreme Court where one decree alone of the High Court had been carried in further appeal. The learned Judges observed that there was no question of *res judicata* at the stage of the second appeals before the High Court, but the position became different in the Supreme Court. According to the learned Judges, the position was analogous to a case where a party to two decrees passed jointly by a trial Court appealed against only one of them, leaving the other to become final. The learned Judges referred to an early decision of the Privy Council in *Sheosagar Singh* v. *Sitaram Singh*[2], in which it was observed:

"If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea of *res judicata.*"

8. It seems to me that the Supreme Court Judgment and the Privy Council's observation directly apply to the present case. It cannot be denied that the subject-matter of the two cross-suits in the present case was precisely the same, namely, the conduct of the business of the tailoring mart, although the reliefs claimed in the two suits were, understandably, different, injunction being asked for in the one case and possession being asked for in the other. This difference, however, in the reliefs asked for, cannot make any difference in the application of the rule of *res judicata*, since in both the suits the question that was directly and substantially in issue was the same. In these events, the learned Subordinate Judge ought to have held that an appeal against one of the decrees alone would be clearly barred under section 11 of the Code. He was not right in proceeding to dispose of the appeal on merits.

9. Learned counsel for the respondents sought to place reliance on the decision of this Court in *Pappammal* v. *Meenammal*[1]. I do not think it necessary to examine this decision considering that the principle laid down by the Supreme Court in *Koshai Pal* v. *Mohanlal*[2], so totally and directly applies to this case.

10. In the result, this second appeal is allowed, the decree of the learned Subordinate Judge is set aside and that of the trial Court restored. There will be no order as to costs.

R.S. —— *Appeal allowed.*

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1. A.I.R. 1976 S.C. 688.
2. (1897) 24 I.A. 50.

1. (1943) 1 M.L.J. 1: 56 L.W. 12: 205 I.C. 618: A.I.R. 1943 Mad 139.
2. A.I.R. 1966 S.C. 688.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*C. J. R. Paul, J.*

State by Public Prosecutor .. *Petitioner**

v.

Soundara Pandian and another .. *Respondents.*

(A) *Railway Property (Unlawful Possession) Act (XXIX of 1966), section 3—Accused found in unlawful possession of railway property — Accused surrendering before Magistrate — Surrender accepted — No notice given to Police—Accused released on bail—Intimation of release given to Police Inspector — Petition by Railway Protection Force to Magistrate to cancel bail and commit accused to the custody of the Railway Protection Force — Request rejected — Offence whether bailable—Order of Magistrate whether liable to be quashed.*

(B) *Criminal Procedure Code,* 1973 (*II of* 1974), *section* 2 (a)—*What is bailable offence and non-bailable offence.*

Under section 2 (*a*), Criminal Procedure Code, the term bailable offence means an offence which is shown, as bailable in the First Schedule, or which is made bailable by any other law for the time being in force, while non-bailable offence means any other offence. In the First Schedule, offences against other laws are made non-bailable or bailable in accordance with the punishment prescribed for the offence. According to the First Schedule, if the offence is punishable with imprisonment for less than three years or with fine only, it will be bailable. But if the offence is one punishable with imprisonment for three years and upwards or is punishable with death, imprisonment for life or imprisonment for more than 7 years, it will be non-bailable. Section 14 of the Railway Property (Unlawful Possession) Act, 1966, states that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. [*Para.* 5.]

Proviso (*a*) to section 8 of the Railway Property (Unlawful Possession) Act states that if an officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate. Only two alternatives are given to the officer of the Force under that proviso. The word 'shall' would govern both the clauses 'either admit him to bail' or 'forward him in custody to such Magistrate'. The third alternative of keeping a person in custody for a period of 24 hours to enable him to complete the investigation as could be done by a police officer while conducting investigation under the Criminal Procedure Code is excluded. If it was intended by this proviso to make offences under the Railway Property (Unlawful Possession) Act bailable the provision for forwarding the accused to such Magistrate in the case of bailable offences when the accused is prepared to offer bail would not have been incorporated. [*Para.* 8.]

The first proviso to section 436 of the Criminal Procedure Code, 1973 says that the officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as provided in the Code. Proviso (a) to section 8 (2) of the Act gives an indication that the offences under the Act are not bailable and that the said proviso in the Act is in no way inconsistent with the First Schedule to the Code of Criminal Procedure, and does not exclude by reason of section 14 of the Act that provision in the Code of Criminal Procedure. [*Para.* 8.]

Held, that the Magistrate's view was incorrect and the offences under the Railway Property (Unlawful Possession) Act are not bailable.

Cases referred to:—

The State of Maharashtra v. *Gendalal,* (1975) Cr.L.J. 815; *State of Uttar Pradesh* v.

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*Crl. M.P. No. 5675 of 1977. *12th April,* 1978.

Durga Prasad, (1975) 3 S.C.C. 210: (1974) S.C.C. (Cr.) 828: (1975) M.L.J. (Cr.) 410: (1975) 1 S.C.R. 881: (1975) 2 S.C. J. 40: (1974) Cr.L.J. 1465: A.I.R. 1974 S.C. 2136.

Petition praying that in the circumstances stated therein and the affidavit filed therewith the High Court will be pleased to quash the order of the Court of the Sub-Divisional Judicial Magistrate, Poonamallee in Crl.M.P. No. 2382 of 1977.

G. Krishnamurthy, Second Government Advocate (Criminal Side), for State.

Sam V. Chelliah, for Respondents.

The Court made the following

ORDER.—This is a petition by the learned Public Prosecutor under section 482, Criminal Procedure Code, for quashing the order passed by the learned Sub-Divisional Judicial Magistrate, Poonamallee, dated 19th September, 1977 in Crl.M.P. No. 2382 of 1977 and for a direction to the learned Magistrate to consider the petition filed by the prosecution for custody of A-4 and A-5 on merits.

2. The facts are as follows: The Inspector of the Railway Protection Force, who has filed the affidavit in support of this petition, arrested one Kannappan (A-1), one Somasundaram (A-2) and one Mariammal, wife of one Soundara Pandian (A-3) for having been found in unlawful possession of two battery cells belonging to the Railways, interrogated them and recorded the statements given by Kannappan and Somasundaram (A-1 and A-2, respectively), which statements implicated Soundara Pandian (A-4), and Thirupathy Nadar (A-5), who are the respondents herein. On the same day, the Inspector recovered from the house of A-3 and A-4 two more battery cells belonging to the Railways and 5 bags of wheat belonging to the Railways from the house of A-1 and two bags of urea belonging to the Railways from the house of A-2. At that time, the respondents herein were absconding.

3. On 19th September, 1977, the respondents herein surrendered before the learned Sub-Divisional Judicial Magistrate, and the learned Magistrate accepted the surrender and directed the release of the respondents on bail on their executing a bond for Rs. 1,000 with two sureties for a like sum each to appear before his Court on 28th September, 1977 and on the subsequent dates of hearings. He also directed that the respondents should reside at Poonamallee and report themselves before the Court daily at 11 A.M. till 28th September, 1977. Apparently the learned Magistrate was of the view that the offences of which the respondents were being accused were bailable and hence it was that without giving notice to the police, he accepted the surrender and passed the aforesaid order on the petition for surrender and bail on behalf of the respondents. Intimation of the release of the respondents on bail was given to the Inspector, Railway Police Force. On 28th September, 1977, the Inspector, Railway Police Force, filed a petition under section 437 (5) read with section 167, Criminal Procedure Code, requesting the learned Sub-Divisional Judicial Magistrate to cancel the bail granted to the respondent and to commit them to the custody of the Railway Protection Force for a period of five days to enable the Railway Protection Force to recover the Railway properties concealed by them. The learned Magistrate thereafter on the same day passed an order on that petition in the following terms:

> "The request of the Railway Protection Force cannot be complied with, as the offence is bailable. The accused will be bound over to appear on 4th October, 1977".

It is this order which is now sought to be quashed.

4. The main question for determination is whether an offence under section 3 of the Railway Property (Unlawful Possession) Act, 1966 of which the respondents are accused, is bailable or whether it is non-bailable. The learned Public Prosecutor has submitted that the offence is not bailable in view of the First Schedule to the Code of Criminal Procedure, and secondly in view of the fact that section 8 of the Railway Property (Unlawful Possession) Act itself indicates that that offence is non-bailable.

5. Mr. Sam V. Chelliah, the learned counsel for the respondents, however, contends

that the First Schedule to the Code of Criminal Procedure would not apply in this case in view of section 14 of the Railway Property (Unlawful Possession) Act, and that in fact, the language of section 8 of the Act itself would show that the offence is bailable. The term "bailable offence" has been defined in section 2 (*a*) of the Code of Criminal Procedure of 1973, as meaning an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force, while "non-bailable offence" means any other offence. In the First Schedule, offences against other laws are made non-bailable or bailable in accordance with the punishment prescribed for the offence. According to the First Schedule, if the offence is punishable with imprisonment for less than three years or with fine only, it will be bailable. But if the offence is one punishable with imprisonment for 3 years and upwards or is punishable with death, imprisonment for life or imprisonment for more than 7 years, it will be non-bailable. Section 14 of the Railway Property (Unlawful Possession) Act, 1966, states that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Invoking this section Mr. Chelliah, the learned counsel for the respondents, would argue that the aforesaid provision in the First Schedule to the Code of Criminal Procedure classifying the offences as bailable or non-bailable, when the offences are against other laws, would be inconsistent with section 8 of the Railway Property (Unlawful Possession) Act, and as such it is section 8 of the Act which would prevail. It may be noted that there is no section in the Act which says that the offences under the Act are bailable. Nor is there any section which specifically states that the offences under this Act are non-bailable. Section 8 prescribed the procedure to be followed in the inquiry to be made against the arrested person. Sub-section (1) of section 8 says:

"When any person is arrested by an officer of the Force for an offence punishable under this Act or is forwarded to him under section 7, he shall proceed to inquire into the charge against such person."

Sub-section (2) says:

"For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognisable case."

The proviso to that section says:

"Provided that:

(*a*) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(*b*) if it appears to the officer of the Force that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the officer of the Force may direct, to appear, if and when so required, before the Magistrate, having jurisdiction and shall make full report of all the particulars of the case to his official superior."

Mr. Chelliah, the learned counsel for the respondents, relies on these two provisos in support of his contention that in view of these provisos, the offences under this Act should be deemed to be bailable. He stresses the words "either admit him to bail", and argues that these words indicate that the officer of the Force, if he is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, is bound to admit that person to bail. The learned Public Prosecutor, however, lays stress on the words "forward him in custody to such Magistrate", and argues that those words indicate that the offence is non-bailable inasmuch as if the offence is bailable, the officer of the Force would not have power to forward the accused person in custody to the Magistrate,

6. Except a decision of the Bombay High Court in *The State of Maharashtra* v. *Gendalal*[1], there is no other decision brought to my notice, which would be of assistance in deciding the question as to whether an offence under the Act is bailable or not. That case arose out of a revision application filed by the State of Maharashtra against the order passed by the Railway Magistrate, Nagpur, for setting aside the order passed by the Railway Magistrate and for cancelling the bail granted by the Railway Magistrate and granting Railway Protection Force police custody of the accused persons for a period of one week. In that case, certain persons were arrested by the Railway Protection Force Sub-Inspector or Inspector and were produced before the Railway Magistrate, Nagpur, with a copy of the diary and with a request for police custody of the accused persons to enable some property to be recovered from them. The Railway Magistrate, however, found that there was no provision for such custody and rejected the application. The learned single Judge of the Bombay High Court held that the impression formed by the learned Magistrate that there is no specific provision in the Act for grant of such custody was not correct, and that the Magistrate should have exercised his discretion of either granting police custody or Magistrate custody as per the facts of the case. The learned Judge, did not, however, give any opinion as to whether an offence under the Railway Property (Unlawful Possession) Act is bailable or non-bailable. But the learned Judge also observed that the Magistrate has exercised his independent powers under the Code of Criminal Procedure, *viz.*, of granting bail and that a proper request can be made in the trial Court under section 497 of the Code of Criminal Procedure, 1898, for cancelling the bail. The aforesaid observations give me the impression that the learned Judge was of the view that an offence under the Railway Property (Unlawful Possession) Act was a non-bailable one, for section 497 of the Code of Criminal Procedure, 1898, relates to bail in case of non-bailable offences. Further more, it is only under section 497 (5) of the Code of Criminal Procedure, 1898, that the question of cancelling the bail granted would arise.

7. Mr. Chelliah, the learned counsel for the respondents, seeks support from the decision of the Supreme Court in *State of Uttar Pradesh* v. *Durga Prasad*[1], for his argument that the First Schedule to the Code of Criminal Procedure cannot be invoked in this case. In the aforesaid case, the Supreme Court held that the inquiry held by an officer of the Railway Protection Force under section 8 (1) of the Act cannot be deemed to be an investigation for the purposes of section 162, Code of Criminal Procedure, and that the scheme of the Act is in important respects different from the scheme of the Code, and there is intrinsic evidence in the Act to show that the provisions of the Code cannot *proprio vigore* apply to inquiries under section 8 (1) of the Act. The Supreme Court further observed that the exclusion of an important provision of the Criminal Procedure Code in matters arising under the Act is not only reflected in section 5 of the Act which deals with in fact of criminal trials, but the exclusion is more in evidence in the provisions of section 14 of the Act, and that in view of the provisions contained in section 14 of the Act, the Act must prevail over the Code. The Supreme Court further observed that an officer conducting an inquiry under section 8 (1) of the Act does not possess all the attributes of an officer-in-charge of a police station investigating a case under Chapter IV of the Code and that he possesses but a part of those attributes limited to the purpose of holding the inquiry. The Supreme Court in that case was considering the statements made before the officers of the Force during an inquiry under section 8 (1) of the Act and held that those statements are not on a par with the statements made under section 161 (3) of the Codes of Criminal Procedure. The Supreme Court, however, has not made any observations in the aforesaid case which would help us to determine whether the offences under the Railway Property (Unlawful Possession) Act are bailable or non-bailable. Therefore, we have to

1. 1975 Crl. L.J. 815.

1. (1975) 1 S.C.R. 881 : (1975) 2 S.C.J. 40 : (1975) M.L.J. (Crl.) 410: (1975) 3 S.C.C. 210: (1974) S.C.C. (Crl.) 828: 1974 Crl.L.J. 1465: A.I.R. 1974 S.C. 2136.

look mainly at the words in the provisos (*a*) and (*b*) of section 8 of the Act.

8. Proviso (*a*) to section 8 of the Act says that if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate. Only two alternatives are given to the officer of the Force under that proviso. The word 'shall' would govern both the clauses "either admit him to bail" and "forward him in custody to such Magistrate". The third alternative of keeping a person in custody for a period of 24 hours to enable him to complete the investigation as could be done by a police officer while conducting investigation under the Criminal Procedure Code is excluded. If it was intended by this proviso to make offences under the Railway Property (Unlawful Possession) Act bailable, the provision for forwarding the accused to such Magistrate would not have been incorporated, for there is no question of forwarding an accused person in custody to the Magistrate in the case of bailable offences when the accused is prepared to offer bail. Mr. Chelliah would read some more words into this proviso. He would add after the word "or" and before the word "forward" the words "if he is unable to offer bail". But, we cannot insert into the provision of a statute words which are not there. Furthermore, if it was the intention of the Legislature to make offences under the Act bailable, the Legislature would have certainly inserted a provision similar to what is contained in section 5 of the Act stating that the offences under this Act shall be bailable notwithstanding anything contained in the Code of Criminal Procedure. It may be noted that section 5 states:

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Act shall not be cognizable."

In the Code of Criminal Procedure, 1973, provision as to bail in the case of persons accused of bailable offences is contained in section 436, which reads as follows:

> "(1) when any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail."

The first proviso to that section says that the officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as provided in the Code. Therefore, in my view the proviso (*a*) to section 8 (2) of the Act gives an indication that the offences under the Act are not liable and that the said proviso in the Act is in no way inconsistent with the first Schedule to the Code of Criminal Procedure, and does not exclude by reason of section 14 of the Act that provision in the Code of Criminal Procedure. I, therefore, find that the learned Magistrate's view that the offences under the Act are bailable is not correct. In these proceedings, I just want to correct the view of the learned Magistrate, I am not prepared to give any direction or make any observation with regard to the question of cancellation of bail or grant of custody. I think under the circumstances of the case I should leave such matters for the consideration of the learned Magistrate before whom the case is pending. Therefore, this petition is allowed to this extent, *viz.*, that the view of the learned Magistrate that the offences under the Act are bailable is corrected, and it is held that the offences under the Act are non-bailable.

R.S. ——— *Petition partly allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—*T. Ramaprasada Rao, CJ., G. Ramanujam and S. Mohan, JJ.*

Satish Majumdar and others .. *Petitioners**

v.

The State of Tamil Nadu, represented by the Commissioner and Secretary to Government, Home Department, Madras-9 and others .. *Respondents.*

(A) *Madras Prohibition Act (X of* 1937) *and Tamil Nadu Liquor (Licence and Permit) Rules,* 1960, *rule* 10 *(B)* (i)—*G.O.Ms. No.* 3495, *dated* 1*st January,* 1978 —*Rules relating to grant of liquor permit—Substantial alteration in—Only person above* 45 *years eligible to apply for permit on grounds of health—Applicant to be examined by Medical Board—Amended Rules, whether* ultra vires *the Prohibition Act—Classification based on age—If violative of Articles* 14 *and* 19 (i) *(b) of the Constitution of India.*

(B) *Constitution of India* (1950), *Articles* 14 *and* 19 (i) *(b).*

The Prohibition Act nowhere gives an absolute privilege to all persons irrespective of age to get a liquor permit for medicinal purposes. The Act has left it to the rule-making authority to decide as to whom and under what conditions a liquor permit is to be granted for medicinal purposes. The rule-making authority while making the earlier rules in 1960 had imposed certain conditions and restrictions in the matter of granting liquor permits. It fixed the minimum age limit for application for permit at 18 and provided for medical examination of the applicants by a single doctor. Nor the rule-making. authority had decided to fix the minimim age limit at 45 and to provide for the medical examination of the applicants by a board of three doctors, and in pursuance of that decision suitably amended the rules. So long as the Act itself does not say as to who are entilled to the issue of a liquor permit on grounds of health and on what conditions, and they are left to the rule-making authority, it can change the rules from time to time. Merely because the rule-making authority has chosen to impose severe and more stringent restrictions than before, it will not mean that it has acted contrary to the provisions of the Act or over-stepped its authority as a delegate. It may be that if the rule-making authority while making the rules has made a rule that no liquor permit will be granted under section 20 for medical purposes under any circumstances, it can be said to be *ultra vires* the provisions of the Act. But where the statute itself gives a discretion to the rule-making authority to regulate the issue of permits for consumption of liquor, it can enumerate the class of persons who can apply for the permit and the conditions which they have to satisfy for getting the permit. [*Para.* 14.]

The statement of objects and reasons of the Prohibition Act seems to suggest that the Legislature has decided to leave the matter of issue of personal permits for consumption of liquor to the Government. Therefore, when the power to except is specifically entrusted to the State Government, the State Government can in its discretion, select persons to whom the exemption is to be granted provided the principles of selection have a reasonable nexus to the object of the Act. The statement of objects and reasons also makes it clear that the intention of the Legislature was to confine the exemption only in respect of bottled foreign liquor and to persons who, by long habit, cannot dispense with the use of the same and whose health is likely to be affected for want of liquor. The amended rule, by restricting the grant of permit to persons above the age of 45 who by long habit cannot dispense with the use of liquor cannot be said to have acted contrary to the said statement of objects and reasons.

[*Para.* 15.]

The expression "medical purposes" contained in Article 19 (5) has to be construed in the light of the directive principles of State Policy of bringing about prohibition of intoxicating drinks and drugs which are injurious to health and so construed, it deviously refers to the user of alcohol for the manufacture of medicine, as otherwise, by allowing the free use of intoxicating drinks and drugs which are injurious to health on the ground that it is a medicine will defeat the very object of that provision. The words "consumption for medical purposes" cannot be equated as consumption as a medicine. This is apart from the question whether intoxicating drinks and drugs can have any thereapeutic or medicinal value. If intoxicating drinks have any therapeutic value and can be used as a medicine, it is possible to

* W.P. Nos. 465, 466, 577 and 321 of 1978.

21*st July,* 1978.

say that Article 47 makes an exception in that regard. Article 47 of the Constitution merely seeks to impose an unenforceable duty on the State to bring about total prohibition of the consumption of liquor and the exemption contained therein in favour of medicinal purposes does not confer any enforceable or vested right on the citizen to own or consume liquor even for medicinal purposes. In any event, the exception contained in Article 47 has to be strictly confined to cases where the consumption of alcohol in the form of intoxicating drinks is necessary on medical or therapeutic grounds. Medical opinion appears to be uniform that alcohol has no medicinal or therapeutic value, except in cases where the disease itself has been brought about by long-standing drinking habit. [*Para.* 17.]

The only persons who will probably be benefited by using liquor as a beverage are those who are found to be addicts and whose health is likely to deteriorate for want of such intoxicating drinks. Having regard to the above circumstances, classification of persons into two categories, one whose health conditions do not absolutely require the use of intoxicating drinks and those whose health is likely to suffer for want of intoxicating drinks because of long addiction, has been made. As already referred to, even before the impugned amendment of rule 10, the rule made a distinction between persons above 18 years of age and below that age for the grant of permit and provided for the grant of permit only to those who are above 18 years of age. The only difference made now in the amended rule is that instead of 18 years of age, the age has been raised to 45. If the rule-making authority as a delegate of the Legislature can make classification of persons into two categories based on age and such a classification has been there right from the inception of the Prohibition Act of 1937, the fact that the age has been raised does not amount to the classification being void and violative of Article 14. All the world over, in almost all the licensing regulations dealing with liquor, persons under 18 years of age are disabled from getting a licence. It may be that the age of 18 was fixed as the minimum age required for getting licence under the regulatory legislation taking note of the fact that a person under the age of 18 should be protected from health hazards by preventing him from consuming intoxicating drinks. In some of the regulatory measures, even the holder of a licence to sell liquor is prohibited from selling such drinks to people under 18 years of age. Uniformly the sale to and purchase by persons under the age of 18 of intoxicating drinks by licensees who are authorised to sell are made penal. For example, under the English Licensing Act, 1968 a holder of a license under that Act knowingly selling or allowing another person to sell intoxicating liquor for purposes of consumption to a person under 18 years of age is punished. [*Para.* 23.]

Having regard to the scheme and object of the Act, in the grant of permit for personal consumption of intoxicating liquor, age cannot be said to be an irrelevant factor and, therefore, the fixation of a minimim age limit cannot be said to be arbitrary. The question as to what should be the minimum age is a matter of policy within the exclusive jurisdiction of the Government and the Government in this case have taken into account the totality of the circumstances, the social requirements, the public interest, and the provisions of Article 47 of the Constitution of India and fixed the age of 45 years as the minimum age. Whether a particular restriction is reasonable or not has to be decided with reference to the nature of the activity sought to be regulated and the scheme and object of the Act under which the regulation is to be made. The scheme of the Act is to prohibit the manufacture, sale and consumption of intoxicating drinks and drugs. While the Act proceeds on the basis that consumption of intoxicating drinks is injurious to health, it should be taken that the manufacture, possession and sale of intoxicating drinks is a noxious trade and the regulations imposed on such a trade have to be considered as reasonable. The tests laid down for judging whether the restrictions imposed on ordinary trade are reasonable or not have no application to the restrictions imposed on noxious trades like trade in intoxicating drinks and drugs which are injurious to health. Though the object of the Prohibition Act, *inter alia,* was total prohibition of consumption of intoxicating drinks, the Act contemplates exemption being granted in the matter of consumption of alcohol for medicinal purposes. Therefore the Act provides for the grant of permits for persons who may require intoxicating drinks on grounds of health. The Legislature has given the power to the rule-making authority, the Government, to select persons and prescribe the conditions for the grant of liquor permits on grounds of health. In exercise of such a discretion the Government has prescribed

that people above the age of 45 who have become addicts by long habitual drinking will alone be granted liquor permits on grounds of health, as such perons will suffer in health if they are suddenly prevented from consuming alcoholic drinks. In those circumstances, there is nothing improper or illegal in restricting the grant of liquor permits only to those persons who have become addicts by long and habitual drinking and whose health will suffer for want of intoxicating drinks When the Legislature has laid down the guiding principles in the Act and a discretion has been given to the Government to select the persons to whom the restrictions are to apply, such a power cannot be said to be an excessive delegation. It cannot be said that the selection made by the rule-making authority will be bad for excessive delegation or for abdication of the legislative power. The rule-making authority of course, has to act within the framework of the law and within the limits of the policy frame work laid down therein. It is open to the Legislature to leave it to the executive to determine the details for carrying out the legislative object and intent snch as the selection of persons for the application of the provisions of the Act. Though it is true that the Legislature cannot delegate its essential legislative function in any case, it can delegate any subsidiary or ancilliary powers to a delegate of its choice to be exercised in accordance with the legislative policy.

[*Para.* 25.]

The statute gives a discretion to the rule-making authority to select persons for the grant of exemption, that is for the purpose of granting liquor permits on grounds of health. In the exercise of that discretionary power it is open to the rule-making authority to restrict the exemption only to such of those persons whose health will positively be affected by reason of prevention of consumption of liquor. The rule-making authority has proceeded on the basis that only persons above the age of 45, because of their long addiction to drink will require alcoholic drinks as a beverage for the proper upkeep of their health, and that the health of people below the age of 45 may not suffer for want of drinks as in their case the period of addiction may not be considerable. The rule-making authority has understood the policy behind the Act as one to permit the consumption of alcohol only in cases where it is required as a medicine and in its view only those who are above 45 years of age and the period of addiction is considerably long may require intoxicating drinks as medicine as without the use of alcohol their health will deteriorate. Medical opinion appears to be uniform against the consumption of alcohol as a curative, except in cases of long addiction. In cases of long addiction, certain withdrawal symptoms occur and those symptoms can be avoided only by use of alcoholic drinks. Drinking of small quantities of alcohol regularly over a long period of time does not have any conclusively demonstrated pathological effect. Therefore such cases may not require the use of alcohol as a medicine. From the point of view of health, it is only a relatively small minority of excessive drinkers who suffer from certain physical and mental disorders that are caused directly or indirectly by heavy drinking and only such extreme cases are thought of for grant of permit to consume liquor to sustain their health.

[*Para.* 26.]

Therefore, in the light of the objects of the Act which is one to prohibit consumption of intoxicating drinks, the fixation of a minimum age of 45 for the purpose of grant of liquor permits on the ground that for want of consumption of liquor the bodily condition of such persons and who are addicts will worsen can be justified to be reasonable.

[*Para.* 28.]

It is true, the high level committee suggested the minimum age limit of 30. But the report of the high level committee is not to bind the Government and it is open to the Government to take a view different from that of the committee for stricter enforcement of prohibition in the State and to say that only extreme cases of long addiction will be considered for the grant of permits on grounds of health. Once the discretion has been given to the State Government to select and classify persons in the matter of grant of permits, the classification need not be shown to be scientifically perfect or logically complete so long as it does not exhibit any vice of discrimination. Therefore the fixation of the minimum age limit of 45 for making an application for the grant of liquor permits on grounds of health cannot be said to be unreasonable or contrary to the provisions of the statute.

[*Para.* 29.]

Cases referred to:—

Attorney-General for Ontario v. *Attorney-General for Canada*, (1912) A.C. 571; *State of Bombay* v. *F.N. Balsara*, 1951 S.C.J. 478: 1951 S.C.

R. 682 : (1951) 2 M.L.J. 141: A.I.R. 1951 S.C. 318; *Md. Haifb Quareshi* v. *State of Bihar*, 1959 S.C.R. 629:(1958) M.L.J. (Crl.) 727: 1958 S.C.J. 975: A.I.R. 1958 S.C. 731; *Cooverjee* v. *Excise Commissioner, Ajmer*, 1954 S.C.J. 246: 1954 S.C.R. 873: A.I.R. 1954 S.C. 220 ; *HarShan kar* v. *Dy. Excise. T.Commissioner*, (1975) Tax L.R. 1569 : (1975) 1 S.C.C. 737 : (1975) 3 S.C.R. 254: A.I.R. 1975 S.C. 1121 ; *State of Madras* v. *V.G. Row*, 1952 S,C.R. 597 : 65 L.W. 420 : 1952 2 M.L.J. 135: 1952 S.C.J. 253: A.I.R. 1952 S.C. 196.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith, the High Court will be pleased to issue (*i*) writs of declaration declaring G.O.Ms. No. 3495, Home, dated 31st December, 1977, published in the Tamil Nadu Government Gazette, Part III, Section 1 (*a*) dated 1st, January, 1978 to be illegal and void in so far as they affect the petitioner. (in W.P.No. 465 of 1978); (*ii*) declaring G.O.Ms. No. 3495, Home, dated 31st December, 1977 published in Tamil Nadu Government Gazette dated 1st January, 1978 as *ultra vires* the Prohibition Act, 1937 and violative of Article 14 of the Constitution (in W.P.No. 557 of 1978);(*iii*) to issue a writ of *mandamus* directing the respondents herein to consider the grant of the petitioner's application for the renewal of his liquor permit made on 3rd February, 1978 in accordance with the Tamil Nadu Liquor (Licence and Permit) Rules, 1960, as in exist nce prior to 1st January 1978 (in W.P. No. 466of 1978); and (*iv*) declaring section 20(*a*), 4 (1)(*a*),4 (1) (*j*) and 4 (A) of the Tamil Nadu Prohibition Act (X of 1937) and the rules framed in that behalf in G.O.Ms. No. 2462 Home dated, 18th August, 1960 as amended by G.O. Ms.No. 3495, Home dated 31st December,1977 and published in the Tamil Nadu Government Gazette, Extraordinary in Part III, Section 1 (*a*) dated 1st January, 1978 relating to possession and consumption of liquor for health and medicinal purposes as invalid in so far as the petitioner is concerned (in W.P.No. 321 of 1978).

K. K. Venugopal, for *V. Manivannan*, *A.P. Venkatachalam*, *G. Gajaraj*, *M. Krishnappan*, *N. Ganapathi*, *G. Ramaswamy* and *R. Mahesh*, for Petitioner.

The Advocate-General assisted by Government Pleader, for Respondent.

The Order of the Court was pronounced by

Ramanujam, J.—. Since the points involved in all these petitions are the same, they are dealt with together.

2. As the facts in all the cases are substantially the same, it is enough if we deal with the facts in the first case that is W.P. No. 465 of 1978. The petitioner in W.P. No. 465 of 1978 is one Satish Majumdar who has adopted the affidavit filed by one N. S. Mani in W P.Nos. 463 and 464 of 1978 which have already been disposed of by one of us on 9th February 1978. The petitioner in W.P. No. 465 of 1978 was a holder ofa liquor permit issued by the State of Tamil Nadu since September, 1974 and that permit expired on 20th January, 1978. On 3rd February, 1978 he applied for the renewal of the said permit in accordance with the Madras Liquor (Licence and Permit) Rules, 1960, hereinafter referred to as the rules, in the prescribed form. Just before the renewal application was filed certain nodifications were effected in the said rules by G.O. Ms. No. 3495, Home dated 31st December, 1977 published on 1st January, 1978. Rule 10 (*B*) (1) of the rules relating to the grant of permits on grounds of health was substantially altered. Under the new rule :

(1) Only persons who are 45 years of age and above on the date of the application can apply for permits to consume liquor on grounds of health, and

(2) Every applicant shall be examined by a Medical Board consisting of the Dean of the local Medical College, who will be the Chairman, a Psychiatrist and a local Doctor specialising in alcohol cases.

The petitioner who was 42 years of age on the date of the application, apprehending that his application for renewal will be rejected on the basis of the rules as amended by G.O.Ms. No. 3495, Home, dated 31st December, 1977, has approached this Court for the issue of a writ declaring the amended rules as void and for *mandamus* directing the respondents herein to consider and grant the renewal of his permit in accordance with the rules relating to such renewals as they stood before 31st December,1977 on the following three grounds.

(1) G.O. Ms. No. 3495, Home, dated 31st December, 1977, which amended the relevant rules with effect from 1st

January, 1978, is not restrospective in character and, therefore it, cannot apply to pending applications.

(2) That the rules as amended with effect from 1st January, 1978 are *ultra vires* the Prohibition Act in so far as it is intended not to facilitate the grant of personal permit in accordance with the scheme and object of the Act, but to deter persons from applying for or being granted such permits.

(3) That the rules as amended enable the authorities to refuse renewal of liquor permits merely on the ground of age and the classification based on age has no reasonable nexus to the purpose sought to be achieved by the Prohibition Act and that, therefore, the classification based on age violates Articles 14 and 19 (1) (*f*) of the Constitution.

3. For appreciating the above contentions, it is necessary to trace briefly the history of legislation relating to Prohibition in the State of Tamil Nadu. In the year, 1937, purporting to exercise legislative power under Entry 31 of List II of the Government of India Act, 1935, the Madras Legislature enacted the Madras Prohibition Act, 1937. The preamble to the said Act stated that it was expedient to bring about Prohibition, except for medicinal, scientific, industrial or such like purposes, or production, manufacture, possession, export, transport, purchase, sale and consumption of intoxicating liquors and drugs in the State of Madras. In the statement of objects and reasons it is stated:

"The Bill penalises all traffic and consumption of liquor and intoxicating drugs, but provides (1) for the exemption of certain articles which may contain alcohol but which the medical profession need for their work, such as certain forms of cod liver oil and the like, or which may be needed for any industrial or scientific purposes or any purpose other than as a beverage ; (2) for permission being granted under licences to medical men and others to deal in prohibited articles, since it is necessary for medical, scientific and industrial purposes etc; (3) for the issue of personal permits to those who, in the opinion of the Government may be specially exempted and permitted to keep and consume liquor; (4) for the issue of licences to existing institutions and clubs to possess liquor and issue it to such of the members as are permitted to consume liquor. It is the intention to use the last two provisions only in favour of bottled foreign liquor and of persons and institutions consisting of persons who by long habit cannot dispense with the use of the same and who are not likely in the opinion of the licensing authority to abuse the concession."

4. 'Intoxicating drug' and 'liquor' had been defined in sections 3 (8) and 3 (9) of the Act, respectively. 'Liquor' is defined in section 3 (9) as including toddy, arrack, spirits of wine, denatured spirits, spirits, wine, beer and all liquid consisting of or containing alcohol. Section 4 prohibited the manufacture of, traffic in, and consumption of liquor and intoxicating drugs. Section 16, however, gave power to the State Government to exempt, subject to such conditions as they think fit, any specified liquor or intoxicating drug from the observance of all or any of the provisions of the Act on the ground that such article is required for a medicinal, scientific, industrial or such like purpose. Section 18 empowered the State Government or the Collector to issue licences to any person for the manufacture, export, import, transport, sale or possession of any liquor or intoxicating drug on the ground that the same was required by such person for a *bonafide* medicinal, scientific or industrial purpose. Section 20 provided for the issuance of permits and licences by the Government or any officer empowered by them in that behalf. That section is as follows :

"The State Government or any officer empowered by them in this behalf may issue—

(*a*) permit authorising any person to consume and possess for personal consumption any liquor or intoxicating drug;

(*b*) licences to any institution to possess liquor and issue it to such of its members as hold permits under clause (*a*):

(*c*) licences to any person in charge of a restaurant car attached to a railway train to possess liquor and serve it to *bona fide* passengers travelling by the train;

(*d*) licences to any person to possess liquor and issue it to persons or institutions who hold permits or licences under this

Act or who have been exempted under this Act from so much of the provisions of section 4, sub-section (1), clause (*a*) or (*j*) as relates to the possession, consumption or buying of liquor."

5. Section 23 provided for the cancellation of the permits or licences granted for violation of the provisions of the Act or the Rules or the conditions of the permit or licence. Section 54 authorised the making of Rules by the State Government for the purpose of carrying into effect the provisions of the Act and in particular for the issue of licences and permits and enforcement of the conditions thereof.

6. Madras Liquor Permit (Personal Consumption) Rules, 1956, were made to regulate the issue of liquor permits for personal consumption. Rule 4 of those Rules provided for the issue of permits to possess and consume liquor on grounds of health on payment of a fee of Rs.70 payable in two instalments of Rs. 20 at the time of the application and Rs. 50 at the time of the issue of the permit. The said Rule also provided that any person desiring to possess and consume liquor on grounds of health should apply to the Medical Officer, who should be a Stipendiary Civil Surgeon or a District Medical Officer, for medical certificate in Form B and the Medical Officer may give a medical certificate on completion of the medical examination, if in his opinion a permit may be granted to the applicant. Sub-rule (3) of rule 4 provided for the application along with the medical certificate being sent to the Government. The Government, on receipt of the application along with the medical certificate has to satisfy themselves (*i*) that the applicant is not a minor, (*ii*) that the health of the applicant will be seriously and permanently affected if he is not permitted to possess and consume liquor mentioned in the application, and (*iii*) that the personal circumstances of the applicant justify his being granted a permit and that he is not likely to misuse the permit. If the Government is not satisfied with the *bona fides* of the medical certificate enclosed along with the application, the applicant concerned may be required to appear before the Director of Medical Services or his nominee at Madras for a second medical opinion, which second opinion shall be accepted by the Government. If the Government is satisfied that there is no objection, then it will issue a permit on payment of the second instalment of the fee of Rs.50. Sub-rule (6) of rule 4 provided that no permit shall be granted for a period exceeding that recommended by the Medical Officer and it shall in no case exceed one year at any one time. Sub-rule (7) of rule 4 requires the holder of a permit desiring to renew the permit to make an application for renewal at least one month before the date of expiry of the permit and the proviso to that sub-Rule stated that it shall not be necessary to produce a medical certificate with an application for renewal, unless the holder desires that the quantity of liquor allowed under the permit should be increased.

7. In supersession of the said Rules, a fresh set of Rules called the Madras Liquor (Licence and Permit) Rules, 1960, were issued by G.O. Ms. No. 2462, Home, dated 18th August, 1960. Chapter III of the said Rules dealt with the grant of personal permits. Rule 10 (B) (I) of the said Rules sets out the procedure for the grant of permit on grounds of health and this procedure was practically the same as the one under the 1956 Rules referred to above, except that the medical certificate which is to accompany the application for personal permit was to be in Form F.P.Mc. This form was substantially the same as the original Form B. However, on 29th April, 1970, a slight modification was made in that every registered medical practitioner was authorised to issue a medical certificate in Form B at the request of an applicant on payment of the usual fee for medical examination.

8. On 1st September, 1971, the operation of the Prohibition Act, 1937, was suspended by the Tamil Nadu Prohibition (Suspension of Operation) Act (XXXIII of 1971), with effect from 1st September, 1971. Later, Tamil Nadu Prohibition (Revival of Operation (Amendment) Act), 1974, revived the operation of the Prohibition Act, 1937, with effect from 1st September, 1974. The said Act of 1974 also brought in certain amendments to the 1937 Act. In the original Act a new section 24-A was introduced which provided for the auction of the privilege of selling by retail any liquor or article containing any such liquor. Subsequently by Tamil Nadu Act I of 1975 the said section 24-A introduced in 1974 has been repealed and in turn new sections 20-A and 20-B were introduced. Section 20-A provided for the matters to be taken into consideration by the licensing authority for granting a permit under the Act. Section 20-B

gave preference to Co-operative Societies over every other applicant in the matter of grant of licence under clause (*d*) of section 20. On 4th May, 1977, the Madras Liquor (Licence and Permit) Rules, 1960, was amended but those amendments are not of much consequence except that the definition of "medical officer" who is entitled to give a medical certificate was again altered so as to apply only to a Stipendiary Civil Surgeon in the service of the State Government or a District Medical Officer. By the impugned G.O. dated 31st December, 1977, the 1960 Rules were substantially amended and the amendments came into force on 1st January, 1978. As per the amended rule 10 (B) (I) a person who is 45 years of age and above can alone apply for a permit to possess and consume liquor on grounds of health and a Medical Committee consisting of the Dean of the local Medical College as Chairman and a Psychiatrist and a local Doctor specialised in alcohol cases as members has to be constituted for the purpose of granting the medical certificate, and six such committees are to be constituted in each of the following places: Madras, Chingleput, Coimbatore, Madurai, Thanjavur and Tirunelveli. The fee for grant of a permit was fixed at Rs.130 payable in two instalments of Rs. 30 at the time of the application and Rs. 100 at the time of the grant of permit. Under the amended Rules there is no provision for a second medical opinion. It is perhaps due to the fact that a committee consisting of three members of the medical profession headed by Dean of a local Medical College has been constituted to issue a medical certificate in Form F. P. Mc. which was not the case before. It is the latest amendment made in rule 10 (B) (I), which brought about two main changes in the existing Rules, (*i*) person above 45 years of age alone can apply for a permit, and (*ii*) the applicants must undergo a medical examination before a medical board instead of a single Medical Officer, that is under challenge in these writ petitions.

9. The tenability of the first of the three contentions put forward by the petitioner has been pratically accepted by the respondents. The learned Advocate-General represented to the Court that the renewal applications filed on or before 31st December, 1977 will be considered only in the light of the Rules which existed prior to that date. Similar statement of the learned Advocate-General was recorded by this Court on 9th February, 1978 in another batch of cases, which is as follows:—

"The learned Advocate-General states that the case of the petitioner would be considered only in the light of the Rules which existed prior to 31st December, 1977. This statement is recorded and the writ petitions are ordered in terms of that statement, the applications of the petitioner would be considered on merits."

The stand taken by the respondents in their counter-affidavits is also the same. Therefore this contention need not detain us any further.

10. As regards the second contention that the provisions of the amended rules are *ultra vires* the Act, the petitioner's case is that the composition of a medical committee instead of one medical officer for issue of a medical certificate and the cumbersome procedure provided for under the Rules as amended practically defeats the object and the scheme of the Act which provides for the grant of a personal permit on grounds of health. It is also contended that the amended rule 10 (B) (I) so far as it enables only those persons who are more than 45 years of age to apply for a permit is contrary to the provisions of the Act as the Act enables all persons irrespective of their age to apply for a liquor permit on grounds of health and that it is not open for the rule-making authority to travel beyond the provisions of the Act and fix a minimum age limit for making applications for the grant of a liquor permit. It has been alleged by almost all the petitioners in these cases that the creating of six medical committees consisting of three Doctors each to medically examine all the applicants throughout the State is quite inadequate having regard to the number of applications filed after 1st January, 1978 seeking renewals and that even if the medical committees were to work 8 hours a day, without the Dean of the Medical College or the specialists attending to their normal work, it would not be able to examine all the applicants, before the expiry of the permit of which renewal is sought. According to the petitioners there were 65,000 permits throughout the State of which 40,000 were in the Madras City alone on 31st December, 1977 and in view of the number of applications for renewal an applicant for a new permit will have to wait as long as 8 years before he is called before the Medical Board for examination. The petitioner also complainted that as six medical boards had been created only at 6 centres and not in all district centres, an applicant will

have to travel over 100 miles for being examined by the medical board and if he is not examined for some reason on a particular day fixed by the medical board, he will have to repeat his visits to the board. According to the petitioners the cumbersome procedure in the matter of grant of liquor permits on grounds of health introduced by the rule-making authority under the amended Rules was only intended to prevent an applicant being granted a permit which he is entitled to get under the Act and that the amended rules which are thus intended to defeat the scheme and object of the Act are *ultra vires* the Act.

11. With reference to these contentions, the respondents, in their counter-affidavit state that the object and scheme of the Act being total prohibition, the grant of permits under section 20 being an exception, it has been rightly made subject to such conditions as are necessary to effectuate the object and the scheme of the Act and the avowed policy contained in Article 47 of the Constitution, and that as such the amended Rules prescribing the conditions for the grant of permit are perfectly valid and quite in accord with the scheme, object and provisions of the Act. As regards the petitioner's allegation that the Constitution of 6 medical boards is quite inadequate for the entire State, it is stated in the counter-affidavit that if it is found that the committees constituted are not able to cope up with the number of applications, the Government would constitute more committees to meet the needs. As regards the hardship pointed out by the petitioners in appearing before the medical board constituted under the Rules situated at far off places, the counter-affidavit points out that the allegation of hardship is not warranted, that the grant of permits under section 20 being an exception it is open to the Government to impose such conditions as are necessary to have an effective check and that the Rules in question which provide for such checks can under no stretch of imagination be attacked on personal ground of hardship, inconvenience etc.

12. Mr. K. K. Venugopal, appearing for some of the petitioners submits that a rule-making authority can make Rules to implement only the legislative policy and cannot go behind it with a view to give effect to a policy decision taken by the executive, that decision has been taken by the State Government to fix the minimum age limit of 45 years for making an application for a liquor permit on grounds of health and to make the provisions for the grant of permit more stringent with a view to see that even people above 45 may not be able to get the liquor permit, and that it is only in pursuance of that policy the Rules have been amended. According to him, the preamble to the Prohibition Act, 1937, makes it clear that the consumption of liquor for medical purposes is not prohibited under that Act. The preamble to an Act is the best guide to find out the scheme and the policy behind the Act. Even Article 47 of the Constitution which sets out one of the directive principles of the State policy merely contemplates prohibition of consumption, except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health and, therefore, the consumption of liquor for medicinal purposes was not intended to be completely prohibited at any time, either by the Constitution or by the provisions of the Prohibition Act. While so, the executive has attempted to impose virtually a partial prohibition on the consumption of liquor for medicinal purposes by introducing a minimum age limit for making an application and making the regulatory provisions for the grant of a liquor permit on grounds of health more stringent with a view to substantially, if not altogether, prohibit the grant of liquor permits. It is urged by the learned counsel that as the provisions of the Act have facilitated the issue of liquor permits on grounds of health and did not prohibit altogether the grant of such permits, it should be taken that the Act has given a mandate to the rule-making authority not to prohibit the consumption of liquor for medicinal purposes and that when the statute is so explicit, is should be taken to be conclusive, both in what it directs as well as what it forbids. According to the learned counsel, therefore, the statute not only forbids consumption of liquor for non-medicinal purposes but also permits the consumption of liquor for medicinal purpose. The learned counsel refers to the following well-known passage in *Attorney-General for Ontario* v. *Attorney-General for Canada*[1]:

> "In the interpretation of a completely self governing Constitution founded upon a written organic instrument, such as the British North America Act if the text is explicit the text is conclusive, alike in what it directs and what it forbids."

1. (1912) A.C. 571 at p. 583.

In support of his submission that the Prohibition Act should be taken to forbid the rule-making authority not to prohibit consumption of liquor for medicinal purposes by imposing such restrictions as will make it impossible for the applicants to get the permits for consumption of liquor on grounds of health, it is pointed out that ever since the commencement of the Prohibition Act, liquor permits were being granted on grounds of health, that though there were slight changes in the procedure permit on grounds of health was not seriously affected or taken away, that even after the Act was revived in 1974 the practice of granting liquor permits on grounds of health continued and that it is only by the amendments made on 31st December, 1977 the rule-making authority has attempted to go behind the legislative policy of facilitating grant of liquor permits on grounds of health, by making the regulatory provisions stringent and by fixing a minimum age limit for making an application for the grant of such a permit. According to the learned counsel there is a legislative mandate for giving liquor permit for medicinal purposes and the rule-making authority which is a delegate of the Legislature cannot go behind that mandate and prevent the consumption of alcohol for medicinal purposes. In effect the learned counsel goes to the extent of saying that the Prohibition Act is intended to prohibit consumption of alcohol for non-medicinal purposes and it does not prohibit consumption of alcohol for medicinal purposes.

13. On this aspect, the learned Advocate-General appearing for the respondents submits that the Prohibition Act is intended to bring about total prohibition of consumption of intoxicating drinks and drugs which are injurious to health, that in the process of giving effect to that object of total prohibition, it has to necessarily regulate the consumption of alcohol for medicinal purposes as otherwise in the guise of using alcohol for medicinal purposes one can violate the provisions of the Act with impunity, that alcohol may be used as an ingredient for the manufacture of drugs or as a beverage, that the user of alcohol as an ingredient for medicinal purposes is regulated by one set of Rules made under the Act, that in a like manner the user of alcohol as a beverage for medicinal purposes is regulated by a different set of Rules, and that it is neither correct nor possible to say that the rule-making authority cannot regulate consumption of liquor for medicinal purposes. The learned Advocate-General refers to sections 4, 18, 20 and 2 and submits that the statute itself gives a mandate to regulate user for consumption of liquor for medicinal purposes and that it is only in pursuance of such a regulatory power granted to the rule-making authority under the Act, the rules have been framed. According to the learned Advocate-General once the regulatory power is conceded on the part of the rule-making authority, then the rules which are made in exercise of that power cannot be questioned either on the ground of hardship or unreasonableness.

14. The Rules regulating the issue of liquor permits on ground of health have been there right from the inception of the Act and it is not the contention of the petitioner that the said rules which provide for such a regulation are contrary to the provisions of the Act. The petitioner's attack is only against the amended rule 10 (B) (I) which brought about a change in the existing Rules. Thus the question ultimately comes to this; whether the regulatory provisions contained in the amended rule 10 (B) (I) of the Madras Liquor (Licence and Permit) Rules, 1960, falls outside the rule-making power contained in section 54 of the Prohibition Act, 1937, and as such *ultra vires* the Act. Section 54 of the Act enables the Government to make rules for giving effect to the provisions of the Act and in particular for the issue of licences and permits. In pursuance of that rule-making power the State Government framed the 1960 Rules. Those rules originally provided for the examination of the applicant by a Medical Officer on payment of certain fee. That procedure is now modified by virtue of the amendment of the Rules brought in on 31st December, 1977 and a new procedure of medical examination by a medical board has been introduced. The mere fact that there is an alteration in the personnel who is to give the medical certificate will not make the amended rule *ultra vires* the Act. The other amendment brought in 31st December, 1977 is fixing a minimum age limit for making an application for a liquor permit on grounds of health. Even before the said amendment, only those persons who are above the age of 18 could make an application for liquor permits under the Rules. Now the rule-making authority by amending rule 10 (B) (I) made all persons below the age of 45 ineligible to make an application. Once the statute vests in the rule-making authority the power to regulate the issue of permits, the rule-making authority can, in exercise of that regulatory power, decide the

class or category of persons who can be considered suitable for the issue of a liquor permit. At this stage we are not concerned as to whether the fixation of age limit violates Articles 14 or 19 of the Constitution. That question will be dealt with later while dealing with the third contention. We are, at this stage, concerned only with the question whether the amended Rules are *ultra vires* the provisions of the Act. On a due consideration of the matter, we are not in a position to say that the amendments brought in by the impugned G.O. on 31st December, 1977 are *ultra vires* the Act. We are not inclined to agree with the learned counsel for the petitioners that the Prohibition Act does not at all deal with the consumption of liquor for medicinal purposes and that the Act should be construed, having regard to its preamble, only as dealing with consumption and possession of liquor for non-medicinal purposes. As already stated, section 20 permits the possession and consumption only on the basis of a permit or licence issued by the State Government. The statement of objects and reasons set out in the bill makes it clear that personal permits are intended to be issued only to persons who by long habit cannot dispense with the use of the same. Even assuming for purposes of argument that the Act is intended only to prohibit possession and consumption of liquor for non-medicinal purposes as urged by the petitioners, still an effective enforcement of such a prohibition will not be possible unless the Act or the Rules define as to what are medicinal and non-medicinal purposes and who are the persons entitled to consume liquor for medicinal purposes. It is not the case of the petitioners that the Rules as amended do not altogether give effect to the provisions of the Act or further its objective. On the other hand, what is stated by them is that the amended rules only give a limited operation of the provisions of the Act facilitating the grant of liquor permits for medicinal purposes, by extending the privelege, only to persons beyond the age of 45, that the amended Rules should not have imposed such a restriction as to age in the matter of an application for a liquor permit and that such a restriction runs counter to the provisions of the Act. We are of the view that this contention cannot be accepted as tenable. The Act nowhere gives an absolute privilege to all persons irrespective of age to get a liquor permit for medicinal purposes. The Act has left it to the rule-making authority to decide as to whom and under what conditions a liquor permit is to be granted for medicinal purposes. The rule-making authority while making the earlier rule in 1960 had imposed certain conditions and restrictions in the matter of granting liquor permits. It fixed the minimum age limit for application for permit at 18 and provided for medical examination of the applicants by a single doctor. Now the rule-making authority had decided to fix the minimum age limit at 45 and to provide for the medical examination of the applicants by a board of three doctors, and in pursuance of that decision suitably amended the Rules. So long as the Act itself does not say as to who are entitled to the issue of a liquor permit on grounds of health and on what conditions, and they are left to the rule-making authority, it can change the rules from time to time. Merely because the rule-making authority has chosen to impose severe and more stringent restrictions than before, it will not mean that it has acted contrary to the provisions of the Act or overstepped its authority as a delegate. It may be that if the rule-making authority while making the Rules had made a rule that no liquor permit will be granted under section 20 for medicinal purposes under any circumstances, it can be said to be *ultra vires* the provisions of the Act. But where the statute itself gives a discretion to the rule-making authority to regulate the issue of permits for consumption of liquor, it can enumerate the class of persons who can apply for the permit and the conditions which they have to satisfy for getting the permit, we are not able to construe the provisions of the Prohibition Act as containing a mandate to the licensing authority to give a permit for medicinal purposes and to hold that the said mandate has been violated or disobeyed by the rule-making authority by making stringent provisions, which might allegedly inconvenience some.

15. The learned counsel for the petitioners would say that the rule-making authority has exceeded its powers as a delegate in two ways. Firstly, it has excluded persons below the age of 45 from applying for a permit and secondly even among the persons above 45 years of age, the issue of a permit is restricted to addicts only. According to the petitioners till the impugned amendment of the rules a medical certificate was being granted even to a person who is not an addict on grounds of health, but now after the amendment it is only persons who are addicts and who are

above the age of 45 can apply and succeed in getting a permit. The learned Advocate-General however submitted that the procedure for getting a liquor permit before the amendment of the rules was somewhat liberal but that does not mean that the rule-making authority cannot make the procedure more rigid-strict, stringent and rigorous to strictly enforce prohibition and that so long as the discretion is left to the rule-making authority in the matter of issuance of liquor permits, it can lay down its own policy for deciding as to whom the permits are to be given and under what conditions provided its policy does not conflict with the scheme of the Act. The statement of objects and reasons of the Prohibition Act which have been extracted above on which the petitioners themselves relied seems to suggest that the Legislature has decided to leave the matter of issue of personal permits for consumption of liquor to the Government. Therefore, when the power to exempt is specifically entrusted to the State Government, the State Government can, in its discretion, select persons to whom the exemption is to be granted provided the principles of selection has a reasonable nexus to the object of the Act. The statement of objects and reasons also makes it clear that the intention of the Legislature was to confine the exemption only in respect of bottled foreign liquor and to persons who, by long habit, cannot dispense with the use of the same and whose health is likely to be affected for want of liquor. The amended rule, by restricting the grant of permit to persons above the age of 45 who by long habit cannot dispense with the use of the same, cannot be said to have acted contrary to the said statement of objects and reasons. The question whether the amended rules are *ultra vires* the provisions of the Act cannot be decided with reference to the earlier unamended rules. It may be that the rule-making authority had made provisions for the liberal grant of the permit earlier to all applicants who are above 18 years of age. But later, it has changed its opinion and chosen to confine the exemption only to those who are above 45 years of age and who have become addicts to drink and whose health is likely to suffer for want of liquor. In these circumstances, we are not in a position to say that the amended rules are *ultra vires* the provisions of the Act.

16. Then we come to the third contention which is based on the violation of Articles 14 and 19 (1) (*f*). The petitioner's case is that liquor as defined in the Prohibition Act is properly protected by Article 19 (1) (*f*) and hence a citizen is entitled to possess and consume it subject to reasonable restrictions permitted by Article 19 (5). Reliance is placed on the decision of the Supreme Court in *State of Bombay* v. *F.N. Balsara.*[1] In that case, the constitutional validity of the Bombay Prohibition Act, 1949 was challenged. The Supreme Court held that to the extent to which the Bombay Prohibition Act prevents the possession, use and consumption of non-beverages and medicinal and toilet preparations containing alcohol for legitimate purposes, the provisions are void as offending Article 19 (1) (*f*), even though they may be within the legislative competence of the Provincial Legislature. There the Court dealt with the consumption of non-beverages and the medicinal and toilet preparations containing alcohol for legitimate purposes, and it was dealing with the consumption of alcohol as a beverage. As a matter of fact, in the case before the Supreme Court it has not been disputed that the restrictions imposed by the Bombay Prohibition Act on the rights of a citizen to possess and consume methylated spirits of wine, beer and toddy are in view of the directive principles of the State Policy set forth in Article 47 of the Constitution quite reasonable, and the Court was asked to consider the reasonableness of the provisions of the Bombay Act only with reference to liquids consisting of or containing alcohol which are normally and ordinarily used as toilets or medicinal preparations. As pointed out in that case when judging the reasonableness of the restriction imposed by the Act one has to bear in mind the directive principles of the State policy set forth in Article 47 under which the State is charged with the duty of bringing about a prohibition of intoxicating drinks and drugs which are injurious to health. The above decision does not support the stand taken by the petitioners that every citizen has got a right to possess and consume liquor as a beverage and the restrictions imposed on such a right are not reasonable restrictions. On the other hand, the said decision proceeds on the basis that the citizen's right to possess and consume liquor as a beverage can be subjected to reasonable restrictions in view of Article 47.

1. 1951 S.C.J. 478 : 1951 S.C.R. 682 : (1951) 2 M.L.J. 141 : A.I.R. 1951 S.C. 318.

17. The learned counsel for the petitioners would submit that Article 47 itself provides an exception in the case of consumption of intoxicating drinks or drugs for medicinal purposes and as such their use as medicine must be permitted and not prohibited by the Act or the rules, that inasmuch as the amended rule 10 prohibits consumption of liquor by persons below the age of 45 even for medicinal purposes far from implementing Article 47 it is in direct violation thereof, and that, therefore, as no public interest can possibly be served by prohibiting medicinal use of alcohol, the amended rule cannot be taken to have been saved by Article 19 (5). Article 47 uses the expression "except for medicinal purposes". The words "medicinal purposes" seem to contemplate the user of liquor for making medicinal preparations and does not contemplate the free use of intoxicating drinks as medicine. The learned counsel for the petitioners would say that the constitution-makers expressly recognised the consumption of alcohol for medicinal purposes and provided it as an exception in Article 47 and, therefore, it is not open to the State to say that intoxicating drinks cannot be consumed for medicinal purposes. We are not able to agree with Mr K.K. Venugopal the learned counsel for the petitioners that Article 47 contemplates free use of alcohol as a drink or as a beverage on the ground that it is for a medicinal purpose. As already stated, the expression "medicinal purposes" contained in that Article has to be construed in the light of the directive principle of State policy of bringing about prohibition of intoxicating drinks and drugs which are injurious to health and so construed, it obviously refers to the user of alcohol for the manufacture of medicine, as otherwise, by allowing the free use of intoxicating drinks and drugs which are injurious to health on the ground that it is a medicine will defeat the very object of that provision. The words "consumption for medicinal purpose" cannot be equated as consumption as a medicine. This is apart from the question whether intoxicating drinks and drugs can have any therapeutic or medicinal value.. If intoxicating drinks have any therapeutic value and can be used as a medicine, it is possible to say that Article 47 makes an exception in that regard. The learned counsel for the petitioners say that in so far as the impugned rule prohibits consumption of liquor by persons below the age of 45 it amounts virtually to a total prohibition of liquor even for medicinal purposes, that the expectation of life of an average Indian male and female is 48 and 46 respectively as per the 1971 census, and that the minimum age of 45 fixed for an application for a health permit will clearly be an unreasonable restriction not protected by Article 19 (5). Article 47 of the Constitution merely seeks to impose an unenforceable duty on the State to bring about total prohibition of the consumption of liquor and the exemption contained therein in favour of medicinal purposes does not confer any enforceable or vested right on the citizen to own or consume liquor even for medicinal purposes. In any event, the exception contained in Article 47 has to be strictly confined to cases where the consumption of alcohol in the form of intoxicating drinks is necessary on medical or therapeutic grounds. Medical opinion appears to be uniform that alcohol has no medicinal or therapeutic value, except in cases where the disease itself has been brought about by long-standing drinking habit.

18. The Tekchand Committee's report on better enforcement of prohibition says:

(1) Medical opinion in America and Western countries has proved that the belief in the curative effect of intoxicating drinks is false.
(2) The claim that alcohol is curative by internal use has been held to be false though it is widely used by physicians as an antiseptic and a stringent for external purposes.
(3) That alcohol has a harmful effect on human system which leads to problems like bounding pulse, insanity, lowering of resistance, hindering of immunity and digestion, cirrhosis of lever, cancer etc.

19. The High Level Committee appointed by the Government of Tamil Nadu for the stricter enforcement of prohibition headed by Mr. Sadasivam, a former Judge of this Court has, in its report, pointed out that the majority of the medical experts who have given evidence before it are unequivocal in their opinion that liquor is not required for reasons of health and that the only justification for the consumption of liquor is on ground of addiction or long habit or for psychological reasons. The said report also refers to a dissenting opinion expressed by another medical expert that there were medicinal uses of alcohol for certain diseases, but says that he was not able to substantiate his view with reference to any well known authority in medicine. The Committee is of the view that modern medicine has got more effective drugs for all ailments and that

the use of alcohol may not have any real medicinal value particularly in a tropical country like India.

20. In Encyclopaedia Brittanica, Volume I under the head "Alcohol and therapeutics" at page 440 the following passage occurs and the same is relied on by the petitioners in support of their stand that alcohol as a beverage has certain medicinal and therapeutic value:

> "Alcohol is often used for medicinal and therapeutic purposes. Whisky is popular for treating colds and snake-bites, brandy for treating faintness, wine for blood building, beer for lactation, and any alcoholic beverage for treating sleeplessness or over-excitement. Many of these uses survive in practice of medicine. Alcohol is administered by physicians in hospital usually by vein, sometimes for anasthesia before minor surgery, more often it is given for sedation after surgery and as a source of easily absorbed calories when it is desirable to bypass the digestive system. Physicians often prescribe "a drink" for a variety of purposes; to stimulate a sluggish appetite, as a sedative to induce sleep, as an anxiolytic in premenstrual tension, as a vasodi lctor in arteriosclerosis, to relieve the vague aches and pains that beset the elderly, and as a supplement in special diets."

21. In the same page under the head "the serious indirect effects of alcohol" it has been pointed out that excessive users of alcohol suffer from both acute and chronic diseases such as disturbances of neuromuscular and mental functions and of body chemistry and that they abnormally tremors will develop a gross trembling of the whole body, sometimes with seizures, mental clouding, disorientation, and hallucinations both visual and auditory. It may be that alcohol has sometimes certain medicinal and therapeutic uses for specific ailments such as cold, snake-bites, faintness, blood-building, lactation, sleeplessness or over-excitement. But the question is when modern medicine has got more effective suitable drugs or medicines for all ailments it is not possible to say that alcohol is the only remedy without the use of which the ailments cannot be cured. Therefore, even assuming that alcohol has some medicinal or therapeutic value, unless it is shown that its use is absolutely necessary for curing a particular ailment or for maintaining good health preventing consumption of alcohol in the course of achieving the object of total prohibition cannot be said to be unreasonable. Reasonableness of any restriction has to be tested with reference to the object of the legislation, and the object of the legislation being total prohibition and the issuance of liquor permits on grounds of health being an exemption to the general rule, that exemption cannot be claimed as of right. Therefore, the restrictions or conditions imposed on an applicant for a liquor permit by the amended rules have to be considered as reasonable restrictions.

22. In *Md. Hanif Quareshi* v. *The State of Bihar*[1] it has been held that the test of reasonableness should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. It has also been pointed out by the Supreme Court in *State of Madras* v. *V.G. Row*[2] that the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict on the question of reasonableness.

23. This leads us to the further question as to whether the amended rule 10 is violative of Article 14 of the Constitution. According to the petitioners the permit being one to be issued for medicinal purposes the classification of persons with reference to age has no reasonable nexus to the objects of permit. As has already been pointed out, intoxicating drug has very little or no medicinal or therapeutic value, and even if it has, the advantage by using the intoxicating drink as a medicine is lost by the adverse effect it has on the human system. The only persons who will probably be benefitted by using liquor as a beverage are those who are found to be addicts and whose health is likely to deteriorate for want of such intoxicating drinks. Having regard to the above circumstances, classification of persons into two categories, one whose health conditions do not absolutely require the use of

1. 1959 S.C.R. 629 : 1958 M.L.J. (Crl.) 727 : 1958 S.C.J. 975 : A.I.R. 1958 S.C. 731.
2. 1952 S.C.R. 597: 65 L.W. 420: (1952) 2 M.L.J. 135: 1952 S.C.J. 253 : A.I.R. 1952 S.C. 169.

131

...s and those whose health ...er for want of intoxicating ...long addiction, has been made. ...red to, even before the impug- ...t of rule 10, the rule made a ...tween persons above 18 years ...elow that age for the grant of p... provided for the grant of permit only to those who are above 18 years of age. The only difference made now in the amended rule is that instead of 18 years of age, the age has been raised to 45. If the rule-making authority as a delegate of the Legislature can make a classification of persons into two categories based on age and such a classification has been there right from the inception of the Prohibition Act of 1937, the fact that the age has been raised does not amount to the classification being void and violative of Article 14. All the world over, in almost all the licensing regulations dealing with liquor, persons under 18 years of age are disabled from getting a licence. It may be that the age of 18 years was fixed as the minimum age required for getting a licence under the regulatory legislation taking note of the fact that a person under the age of 18 should be protected from health hazards by preventing them consuming intoxicating drinks. In some of the regulatory measures, even the holder of a licence to sell liquor is prohibited from selling such drinks to people under 18 years of age. Uniformaly the sale to and purchase by persons under the age of 18 of intoxicating drinks by licensees who are authorised to sell are made penal. For example, under the English Licensing Act, 1968 a holder of a licence under that Act knowingly selling or allowing another person to sell intoxicating liquor for purposes of consumption to a person under 18 years of age is punished.

24. The learned counsel for the petitioners would however, say that in the matter of obtaining liquor permits for purpose of consumption the fixing of the minimum age-limit of 45 cannot, in any event, be said to be reasonable. The learned counsel refers to the fact that even the report of the High Level Committee for the stricter enforcement of prohibition in Tamil Nadu has reported that the minimum age for the grant of liquor permits on grounds of health can be fixed at 30 years, that even otherwise, as a person normally becomes an addict by regular consumption of liquor for a period of 10 to 15 years it is wrong to assume that people above the age of 45 alone would be addicts and not people below that age. On this aspect, the counter-affidavit of the respondents proceeds on the basis that the classification based on age-limit of 45, and the provisions for enabling only a person who has completed 45 years of age to apply for a permit is just and reasonable and is quite consistent with the spirit, object, and purposes of the Act. According to the respondents the age has a relation to health and the law can prescribe an age-limit below which it cannot be reasonably claimed that some illness exists which has necessarily to be treated with alcohol, and it is reasonable to assume that at the age of 45, a man who has become an addict to alcohol may find it difficult to give up that habit at the risk of his health being deteriorated and, therefore he is to be permitted to consume alcoholic drinks for maintaining his health. It is said that the purpose behind fixing the minimum age-limit of 45 is to see that the younger generation should not get themselves acquainted with and used to the consumption of intoxicating liquor having deleterious effect on its health and longevity, and that the classification based on age has a direct relationship to the objects sought to be achieved and there is nothing discriminatory or unreasonable about the said classification.

25. Having regard to the scheme and object of the Act, in the grant of permit for personal consumption of intoxicating liquor, age cannot be said to be an irrelevant factor and, therefore, the fixation of a minimum age limit cannot be said to be arbitrary. The question as to what should be the minimum age is a matter of policy within the exclusive jurisdiction of the Government and the Government in this case have taken into account the totality of the circumstances, the social requirements, the public interest, and the provisions of Article 47 of the Constitution of India and fixed the age of 45 years as the minimum age. Whether a particular restriction is reasonable or not has to be decided with reference to the nature of the activity sought to be regulated and the scheme and object of the Act under which the regulation is to be made. The scheme of the Act is to prohibit the manufacture, sale and consumption of intoxicating drinks and drugs. Section 4 of the Act prohibits the manufacture of, traffic in and consumption of liquor and intoxicating drugs. Article 47 of the Constitution states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are

injurious to health. While the Act proceeds on the basis that consumption of intoxicating drinks is injurious to health, it should be taken that the manufacture, possession and sale of intoxicating drinks is a noxious trade and the regulation imposed on such a trade has to be considered as reasonable. The tests laid down for judging whether the restrictions imposed on ordinary trade are reasonable or not have no application to the restrictions imposed on noxious trade like trade in intoxicating drinks and drugs which are injurious to health. Though the object of the Prohibition Act, *inter alia* was total prohibition of consumption of intoxicating drinks, the Act contemplates exemption being granted in the matter of consumption of alcohol for medicinal purposes. Therefore the Act provides for the grant of permits for persons who may require intoxicating drinks on grounds of health. The Legislature has given the power to the rule-making authority, the Government, to select persons and prescribe the conditions for the grant of liquor permits on grounds of health. In exercise of such a discretion the Government has prescribed that people above the age of 45 who have become addicts by long habitual drinking will alone be granted liquor permits on grounds of health, as such persons will suffer in health if they are suddenly prevented from consuming alcoholic drinks. In those circumstances, there is nothing improper or illegal in restricting the grant of liquor permits only to those persons who have become addicts by long and habitual drinking and whose health will suffer for want of intoxicating drinks. Having regard to the fact that the discretion has been given to the rule-making authority to decide as to who should be allowed to consume intoxicating drinks, the rule-making authority can select persons for the grant of liquor permits having regard to the absolute need of intoxicating drinks for health purposes. It is submitted by the learned counsel for the petitioners that the word "addict" has neither been defined nor any criterion laid down on the basis of which a particular person can be considered as an addict or not and therefore the rule-making authority cannot fix an arbitrary age by saying that people above that age can alone be addicts, and if really such a power has been given to the rule-making authority, that will be an arbitrary and unguided power and will as such, amount to excessive delegation by the Legislature. But having regard to the object of the Act which is one to prohibit consumption of intoxicating drinks, the discretion given to the rule-making authority to give the permit to such of those persons as it considers suitable cannot be said to be arbitrary and unguided. As already stated, the power given to prohibit possession and consumption of any liquor is undoubtedly a reasonable restriction on the individual's right and that power is obviously controlled by the object and purpose of the Act The policy of the legislation has been fully set out in the Act and discretion has been given to the Government in the matter of working out that policy and to achieve that policy. The Government, in the exercise of that discretion selects some persons for the application of the Act and exempts some others. In those circumstances, the power of the Government cannot be said to be unguided or uncontrolled. When the Legislature has laid down the guiding principles in the Act and a discretion has been given to the Government to select the persons to whom the restrictions are to apply, such a power cannot be said to be an excessive delegation. Once the power is given to the rule-making authority to exempt certain persons from the provisions of the Act, the rule-making authority has to select persons for the grant of exemption in the light of the scheme and object of the Act. Therefore it cannot be said that the selection made by the rule-making authority will be bad for excessive delegation or for abdication of the legislative power. It is well-established that the Legislature cannot be expected to provide for every minute detail connected with the subject of the legislation and that it is open to the Legislature to leave ancillary matters for the decision of the rule-making authority as long as the legislative policy is enunciated with sufficient clearness. The rule-making authority, of course, has to act within the frame-work of the law and within the limits of the policy framework laid down therein. It is also well established that it is open to the Legislature to leave it to the executive to determine the details for carrying out the legislative object and intent such as the selection of persons for the application of the provisions of the Act. Though it is true that the Legislature cannot delegate its essential legislative function in any case, it can delegate any subsidiary or ancillary powers to a delegate of its choice to be exercised in accordance with the Legislative policy. As pointed out by Cooley in his Constitutional Limitations, Volume I, 8th edition at page 228:

"The maxim that power conferred upon the legislature to make laws can be delegated to any other authority does not preclude the Legislature from delegating any power not legislative which it may itself rightfully exercise. It may confer an authority in relation to the execution of a law which may involve discretion, but such authority must be exercised under and in pursuance of the law. The legislature must declare the policy of the law and fix the legal principles which are to control in given cases ; but an administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularise, they would miss sufficiency both in provision and execution."

Willoughby on the Constitution of the United States, 2nd edition, Volume III, at page 1637 says :

"The qualifications to the rule prohibiting the delegation of legislative power which have been earlier adverted to are those which provide that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities (1) to determine in specific cases when and how the powers legislatively conferred are to be exercised ; and (2) to establish administrative rules and regulations binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created to be enjoyed."

26. As already stated, in this case, the statute gives a discretion to the rule-making authority to select persons for the grant of exemption, that is for the purpose of granting liquor permits on grounds of health. In the exercise of that discretionary power it is open to the rule-making authority to restrict the exemption only to such of those persons whose health will positively be affected by reason of prevention of consumption of liquor. The rule-making authority has proceeded on the basis that only persons above the age of 45, because of their long addiction to drink will require alcoholic drinks as a beverage for the proper upkeep of their health, and that the health of people below the age of 45 may not suffer for want of drinks as in their case the period of addiction may not be considerable. Admittedly the statute has not prescribed the period of addiction to drink which will entitle any person to get the exemption. The statute also does not say as to what are the ailments for which consumption of liquor as a pure medicine should be permitted. The entire matter has been left to the rule-making authority and the rule-making authority in its discretion has to decide the class of persons who have to be granted exemption from the provisions of the Act by the grant of permits for consumption of alcoholic drinks. The scheme of the Act, as already stated, is to have a total prohibition and by way of exemption, permits have to be granted to such of those persons who require alcoholic drinks as a medicine for their ailments. The rule-making authority in this case has proceeded on the basis that it is only persons who are above 45 year of age who are addicted to drink and whose health is likely to suffer for want of drinks who should be exempted from the provisions of the Act. The rule-making authority has understood the policy behind the Act as one to permit the consumption of alcohol only in cases where it is required as a medicine and in its view only those who are above 45 years of age and whose period of addiction is considerably long may require intoxicating drinks as medicine as without the use of alcohol their health will deteriorate. Medical opinion appears to be uniform against the consumption of alcohol as a curative, except in cases of long addiction. In cases of long addiction, certain withdrawal symptoms occur and those sumptoms can be avoided only by use of alcoholic drinks. Drinking of small quantities of alcohol regularly over a long period of time does not have any conclusively demonstrated pathological effect. Therefore such cases may not require the use of alchohol as a medicine. Hence, the rule-making authority might have felt that it is not in every case of habitual drinking that permit is to be granted and that it is only in extreme cases of addition where the health of the person involved will be affected for want of liquor, the permit should be granted. It is well-known that a vast majority of drinkers are like occasional and moderate drinkers who experience no harm from their own use of alcoholic beverage, but there is a small minority which fall into the category of heavy or excessive or problem drinkers who invokes sufficient troubles for themselves, their families, their employers, and their occupational or social associates. From the point of view health, it is only this

relatively small minority of excessive drinkers who suffer from certain physical and mental disorders that are caused directly or indirectly by heavy drinking and only such extreme cases are thought of for grant of permits to consume liquor to sustain their health.

27. Governmental efforts to control alcoholic beverages go back as far as recorded history. Controls initially took the shape of regulation of prices, taverns and sellers. There have also been frequent legislative attempts at total prohibition in various countries of the world. In several countries efforts have been made to control the use of alcohol by introducing licensing system with limited number and locations of places of sale, restriction of days and hours of sale ; prohibition of sale to the young, with ages varying from 16 to 21 (16 in Yugoslavia and 21 in parts of the United States) regulation of the strength of beverages, the size of containers, advertising, prices, or profits.

28. Therefore, in the light of the objects of the Act which is one to prohibit consumption of intoxicating drinks, the fixation of a minimum age of 45 for the purpose of grant of liquor permits on the ground that for want of consumption of liquor the bodily condition of such persons above the age of 45 and who are addicts will worsen can be justified to be reasonable.

29. The learned counsel for the petitioners submits that the minimim age limit for the issue of liquor permits recommended by the high level committee appointed by the State Government referred to above is 30 years and that the Government atleast should have fixed 30 years as the minimim age limit instead of 45. It is true, the high level committee suggested the minimim age limit of 30. But the report of the high level committee is not binding on the Government and it is open to the Government to take a view different from that of the committee for stricter enforcement of prohibition in the State and to say that it is only extreme cases of long addiction will be considered for the grant of permits on grounds of health. Once the discretion has been given to the State Government to select and classify persons in the matter of grant of permits, the classification need not be shown to be scientifically perfect or logically complete so long as it does not exhibit any vice of discrimination. In *Coverjee* v. *Excise Commissioner, Ajmer*[1] dealing with the validity of (Ajmer) Excise Regulation it has been held that the legislature of a State is fully competent to regulate the business of vending intoxicating liquor to mitigate its evils or to suppress it entirely, that there was no inherent right in a citizen to sell intoxicating liquors, that it is not a privilege of the citizen, that as it is a business attended with danger to the community it may be entirely prohibited or be permitted under such conditions to limit to the utmost its evils and that the manner and extent of the regulation rest in the discretion of the governing authority. In that case it was argued before the Supreme Court that when liquors are taken in excess the injuries are confined to the party offending and therefore there was no necessity to impose restrictions on the business of selling liquor in small quantities. Rejecting that contention the Supreme Court pointed out that though injury in the first instance falls upon the person in his health which the habit undermines, in his morals which it weakens, and in the self-abasement which it creates, it leads to neglect of avocation or business and waste of property and general demoralisation thus affecting those who are immediately connected with and dependent upon him. In *Har Shankar* v. *Deputy Excise and Tax Commissioner*[2], the Supreme Court has clearly pointed out that there is no fundamental right to do trade or business in intoxicants in a citizen, that the State under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicating liquors, its manufacture, storage, export, import, sale and possession. The reasoning in those cases will squarely apply to this case. Therefore the fixation of the minimum age limit of 45 for making an application for the grant of liquor permits on grounds of health cannot be said to be unreasonable or contrary to the provisions of the statute.

30. In Writ Petition No. 321 of 1978, one Mr. R.R. Dalavai, claiming to be the Secretary of an Addict-free society movement, has impleaded himsef as the second respondent. One of the contentions raised by him is that the amended rules framed in G.O. No. 3495, Home, dated 31st December, 1977 which have been impugned in the writ petition

1. 1954 S.C.J. 246: 1954 S.C.R. 873: A.I.R. 1954 S.C. 220.
2. (1975) Tax.L.R 1569: (1975) 1 S.C.C. 737: (1975) 3 S.C.R. 254: A.I.R. 1975 S.C. 1121.

have not come ino force, that the Government order amending the rules is still in its embryo and has not attained any statutory force, that the amended rules will come into force only when they have been placed before the Legislature and approval obtained under section 54 (3), of the Prohibition Act, 1937 and that., therefore, the writ petition should be dismissed as premature. We are not inclined to agree with the above contention. The impugned Government order says that the amendment shall come into force on the first day of January, 1978. Section 54 (3), says that all rules made under this Act shall, as soon as possible after they are made, be placed on the table of both the Houses of the Legislature and shall be subject to such modification by way of amendment or repeal as the Legislative Assembly may make within fourteen days on which the House actually sits either in the same session or in more than one session. Section 54 (3) does not say that till the rules are approved by both the Houses of Legislature, they are not effective. On the contrary section 55 (5) says that all rules mode and notifications issued under the Act shall be published in the Official Gazette and upon such publication, shall have effect as if enacted in this Act. Admittedly the rules have been published in the Official Gazette (Extraordinary) dated 1st January, 1978. Therefore it is not possible to say that the rules have not come into force as they have not got the approval of both the Houses of Legislature. In our view the effect of section 54 (3) is that all rules made under the Act by the rule-making authority shall be placed on the table of both the Houses of Legislature and shall be subject to such modification as the Legislative Assembly may make within a particular period. That provision cannot in our view postpone the operation or enforcement of the rules until after the legislative approval of the rules as made by the rule-making authority. Hence the above contention cannot be accepted as tenable and the writ petition cannot be dismissed merely on the ground that the rules have not come into force.

31. In the result all the contentions advanced by the petitioners fail and the writ petitions are, therefore, dismissed. There will, however, be no order as to costs.

R.S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*P. Govindan Nair, CJ. and S. Padmanabhan, J.*

Premier Cotton Spinning Mills Limited, Kanjidou and others .. *Appellants**

v.

The District Agricultural Officer (Certification Enforcement), Tirupur-638601 and others .. *Respondents.*

Cotton Transport Act (Central Act III of 1923) and Tamil Nadu Government Rules, rule 6 (i)—Appellants carrying on business in cotton yarn in Kerala. procuring necessary cotton from various parts—Bales transported from such parts to Kerala by rail or road—Tamil Nadu Rule requiring licence in respect of cotton passing through protected area to unprotected area—Appellants whether bound to take out licences.

The purpose of the Cotton Transport Act, as is evident from section 3, is to maintain the reputation of cotton grown in any area by prohibiting the import of cotton or of any specified kind of cotton into that area by rail, road, river or sea. Thus, a restriction is sought to be imposed on the import of cotton into the prohibited area. The appellants cannot be said to import the cotton bales into the protected area as defined in the Act when the bales are only in the course of transit from the place of manufacture outside Tamil Nadu into the various factories in Kerala. The appellants are not bound to take out licences in the form 'GG' as required by the District Agricultural Officer (Tiruppur). The amended rule 6 (*i*) in so far as it states that a licence should be obtained in respect of cotton 'passing through the prohibited area to unprotected area' is beyond the powers conferred on the rule-making authorities under section 7 (1) of the Act in so far as it compels a person to take out a licence in respect of the cotton passing through the prohibited area to any unprohibited area. The appellants are not bound to take out a licence so long as the cotton bales are only in the course of transit from outside the State of Tamil Nadu, through the protected area in Tamil Nadu to their respective destination in Kerala. [*Para.* 15.]

* W.A. Nos. 173 and 293 to 301 of 1967 against W.P. Nos. 3428, 1683, 2503 to 2507, 2664 and 2731 of 1976 respectively.

21*st March,* 1978.

Cases referred to:—

Empress Mills v. *Municipal Committee, Wardha*, 1958 S.C. J. 604 : 1958 S.C.R. 1102 : A.I.R. 1958 S C. 341; *Town Municipal Council* v. *Urmilla Kothari*, (1977) 1 S.C.J. 474 : (1977) 2 S.C.R. 660: A.I.R. 1977 S.C. 873.

Appeals under Clause 15 of the Letters Patent against the Order of Mr. Justice Mohan, dated 20th September, 1976 and made in the exercise of the Special Original Jurisdiction of this Court in Writ Petition No. 3428 of 1976 and Order dated 16th September, 1976 in Writ Petition Nos. 1683, 2502, 2503, 2504, 2505, 2506, 2507, 2664 and 2731 of 1976 respectively. Petitions under Article 226 of the Constitution of India to issue Writs of Prohibition prohibiting the respondents in all the appeals from enforcing the provisions of rule 6 (1) of the Rules framed by the Government of Tamil Nadu under section 7 of the Cotton Transport Act, 1923 (Central Act III of 1923) in so far as the petitioner in each of the petitions is concerned.

Subbaraya Ayyar, Padmanabhan, Ramamani and *S V. Subramanian*, for Appellants.

The Government Pleader, for Respondents.

The Judgment of the Court was pronounced by

Padmanabhan, J.—In these writ appeals the validity of rule 6 (*i*) of the Rules framed by the Government of Tamil Nadu under section 7 of the Cotton Transport Act (Central Act III of 1923) is being questioned. These writ appeals have been filed against the dismissal of a batch of writ petitions by a learned single Judge of this Court. The main judgment is found in Writ Petition No. 1683 of 1976.

2. The facts of the case are briefly as follows: The appellants carry on business in the manufacture and sale of cotton yarn in their various factories in Kerala State. They procure the necessary cotton for the manufacture of yarn from different places in India as well as from out of India. The major portion of the cotton is obtained form dealers in cotton in the States of Gujarat, Maharashtra, Punjab, etc. The cotton is supplied in the form of lint and is pressed and packed in hessian cloth over which iron hoops are tied for secure and convenient transportation. Each such packet is known as one bale and weighs between 160 and 180 kilograms. The bales are serially numbered and each bale bears the name of the press in which the cotton is ginned and packed as a bale.

3. These bales are transported from the various States to the appellants' factories in Kerala by rail or in lorries by road. The railway receipts are taken in the name of the appellants and sent to them through banks. The consignees *viz.*, the appellants take delivery of the railway receipts from the bank on payment of cash and clear the goods in Kerala. In the course of such transport by road the lorry has to travel through different States including Tamil Nadu apart from Andhra Pradesh and Karnataka.

4. While so, the District Agricultural Officer (Certification and Enforcement) Tiruppur sent a communication to the appellants to the effect that inasmuch as Tamil Nadu is a prohibited area for the import of cotton as per the Cotton Transport Act (Central Act III of 1923) (hereinafter referred to as 'the Act') the appellant should take licences as required by rule 6 (*i*) of the Rules made by the Tamil Nadu Government. The ground on the basis of which the communication was sent is that the cotton sent from the various States to Kerala pass through Tamil Nadu which is a protected area. The officer concerned enclosed a draft of the application form to be used for that purpose and indicated the fee prescribed for the issue of a licence.

5. Mr. V.K.T. Chari, learned counsel for the appellants submits that the Act provides for the issue of licences only for the import of cotton in the protected area and not 'for the passing of cotton through the protected area'. Even section 7 (1) of the Act which permits a State Government to make rules permits the making of Rules only for the prevention of imports into the protected area and not for the case of transit through the protected area. In these circumstances, the learned counsel submits, that rule 6 (*i*), in so far as it provides for taking out a licence in respect of cotton passing through the protected area to any unprotected area, goes beyond the rule-making power. In the submission of the learned counsel the words 'imported into' contemplate the import of any article into an area to be used or to be delivered inside the particular area for consumption in that area and do not include the mere passage of the goods through the protected area especially having regard to the object and intent of the

Act as set out in the preamble and also the destination and delivery point as contemplated and understood under sections 4 and 5 of the Act. In this view, the contention of the learned counsel is that the State of Tamil Nadu cannot compel the appellants to take out a licence when there is no import of the bales of cotton into the State of Tamil Nadu. The cotton bales are only carried by rail or lorries through the State of Tamil Nadu to their destinations in Kerala.

6. The learned Advocate-General, on the other hand, contends that the underlying idea in the Act is to prevent malpractices in mixing up variety of cottons and only with that intention the Act has been introduced for the perpose of regulating the movement of cotton to maintain the good quality and reputation of cotton. The word 'import' in the Act should not be given a narrow interpretation and that rule 6 (*i*) must therefore be held to the *intra vires* of the rule-making powers under the Act as a regulatory measure.

7. The learned single Judge accepted the contention of the learned Advocate-General that the word 'import' should not be given a narrow interpretation but should be interpreted liberally and be given a wide meaning. Further, after referring to certain decisions the learned Judge held that the measure of requirement of licence contemplated under rule 6 (*i*) of the Act is only regulatory and it only facilitates the maintenance of the good quality and reputation of cotton rather than impede with the trade, within the meaning of Article 301 of the Constitution and he further held, having regard to the possibility of the abuse of the inferior quality of cotton being mixed up with superior cotton, this measure of insistence on licence should be upheld on the theory of 'felt necessities of time' enunciated by Holmes, J.

8. We feel that for the disposal of these appeals it is unnecessary to go into the question how far the provisions of rule 6 (*i*) contravene Article 301 of the Constitution of India. The answer to the poser raised by the appellants lies in the meaning to be attached to the word 'import' contained in the provisions of the Act interpreted in the light of the decisions of the Supreme Court hereinafter referred to. The Act was passed by the Indian Legislature for the purpose of providing restriction and control of the transport by rail and import of cotton into certain areas, for the purpose of maintaining the quality and reputation of cotton grown in those areas.

9. Section 3 of the Act runs as follows:

"3. (1) The State Government may, for the purpose of maintaining the quality or reputation of the cotton grown in any area in the State, by notification in the Official Gazette, prohibit the import of cotton or of any specified kind of cotton into that area by rail, road, river and sea or by one or more of such routes, save under and in accordance with the conditions of a licence:

Provided that no such notification shall be deemed to prohibit the import into any protected area of packages containing any kind of cotton and not exceeding ten pounds avoirdupois weight.

(2) Any such notification may prohibit the delivery to and the taking delivery by any person, at any specified railway station situated in the protected area, of any cotton, the import of which by rail into that area is prohibited when such cotton has been consigned from a railway station not situated in that area, unless such person holds a licence for the import by rail of the cotton into that area.

Protected area has been defined thus under section 2 (*g*) of the Act: 'Protected area" means an area into which the import of cotton or of any kind of cotton has been prohibited wholly or partly by a notification under section 3."

10. Under section 4 (1) booking of goods and parcels by rail is not permitted from one railway station to a notified station unless both the railway stations are in the same protected area or unless the consignor produces a certified copy of a licence for the import of cotton by rail into the protected area, in which such notified station is situated. Under section 5, delivery of cotton at the notified station is prohibited unless the booking station also is in the same protected area or the necessary licence for import is produced. Section 7 (1) which contains the rule-making power provides that the State Government, may by notification in the Official Gazette, make rules to provide for any of the following matters, namely:—

(*a*) Prevention of the import into a protected area by road, river or sea, save under and in accordance with the conditions of a licence, cotton the import of which into that area has been prohibited wholly or partly by a notification under section 3.

(*b*) terms and conditions to be contained in licences, the authorities by which they may be granted and the fees which may be levied in respect thereof; and

(*c*) the manner in which licences and the certified copies thereof shall be dealt with on or after the delivery of the cotton to which they relate.

11. The original notification issued under section 3 of the Cotton Transport Act, 1923 as amended by the Cotton Transport (Amendment) Act, 1925 which is relevant for our purpose is as follows :

"Whereas, it is necessary for the purpose of maintaining the quality and reputation of the cotton grown in the areas in the Madras Presidency mentioned in Schedule I hereto appended:

Now therefore, in exercise of the powers conferred by sub-section (1) of section 3 of the Cotton Transport Act, 1923 as amended by the Cotton Transport (Amendment) Act, 1925 and in supersession of the notification No. 344, dated 18th November, 1925 at page 2244, Part I of the Fort St. George Gazette, dated 24th November, 1925, the Governor acting with his Ministers is hereby pleased to prohibit the import of cotton (kapas, ginned cotton or cotton waste) into the area specified in schedule I and the import of cotton seeds into the Tirunelveli area as defined in that schedule by rail, road, river and sea save under and in accordance with the conditions of a licence prescribed in this behalf."

Schedule 1 to the said notification includes the State of Tamil Nadu.

Rule 6 (*i*) as amended is as follows :

"A single licence to cover only one consignment may be granted to such persons as can satisfy the licensing authority that it is necessary to import cotton of a specified quantity and kind by road and river into the protected area or "passing through the protected area" to any unprotected area (vide G.O.Ms. No. 1740, Food and Agriculture, dated 25th May, 1963). Such licence shall be in Form G and GG hereto annexed and shall be subject to conditions stated therein."

It is as per this rule 6 (*i*) that the District Agricultural Officer (Certification and Enforcement) sent a communication to various appellants calling upon them to take out a licence to cover one consignment in so far as the cotton "passes" through the State of Tamil Nadu which is a protected area to the State of Kerala which is an unprotected area.

12. The question is what is the meaning to be attached to the word 'import' occurring in the Act. In *Empress Mills* v. *Municipal Committee, Wardha*[1], the interpretation of the word 'import' arose for consideration in the following circumstances. The appellant therein, Empress Mills, had its spinning and weaving mills at Yeotmal. They were transporting bales of cotton from Yeotmal to Nagpur by road and vehicles and during such transport the goods passed through the limits of Wardha Municipality. The goods were neither unloaded nor reloaded at Wardha but were merely carried across through the municipal area, during transit to Nagpur. Section 66 (1) (*o*) of the C. P. and Berar Municipalities Act, 1922 provided a terminal tax on goods imported by rail or road at a certain rate and also a terminal tax on goods exported by rail or road at certain rates. The Municipal Committee purporting to act under section 66 (1) (*o*) of the Act and rule 1 of the Rules made thereunder collected Rs. 240 as terminal tax on these goods on the ground that they were exported by the appellant from the limits of the Municipality of Wardha. The Mills claimed a refund of the same on the ground that a mere passage of the goods through the municipal limits of Wardha did not constitute in law 'import' or 'export' within the meaning of the C. P. and Berar Municipalities Act, 1922. In dealing with this contention J. L. Kapur, J., speaking for the Court stated as follows :

" 'Import' is derived from the Latin word *importare* which means 'to bring in' and and 'export' from the Latin word *exportare*

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1. 1958 S.C.J. 604 : 1958 S.C.R. 1102 : A.I.R 1958 S.C. 341.

which means to carry out but these words are not to be interpreted only according to their literal derivations. Lexicologically they do not have any reference to goods in 'transit' a word derived from *transire* bearing a meaning similar to transport *i.e.*, to go across. The dictionary meaning of the words, 'import' and 'export' is not restricted to their derivative meaning but bear other connotations also. According to Webster's International Dictionary the word 'import' means to bring in from a foreign or external source ; to introduce from without; especially to bring (wares or merchandise) into a place or country from a foreign country in the transactions of commerce; opposed to export.

Similarly 'export' according to Webster's International Dictionary means 'to carry away; to remove; to carry or send abroad especially to foreign countries as merchandise or commodities in the way of commerce; the opposite of import'. The Oxford Dictionary gives a similar meaning to both these words.

The word 'transit' in the Oxford Dictionary means the action or fact of passing across or through; passage or journey from one place or point to another; the passage or carriage of persons or goods from one place to another; it also means to pass across or through (something) to traverse, to cross. Even according to the ordinary meaning of the words which is relied upon by the respondent, goods which are in transit or are being transported can hardly be called goods 'imported into or exported from' because they are neither being exported nor imported but are merely goods carried across a particular stretch of territory or across a particular area with the object of being transported to their ultimate destination which in the instant case was Nagpur."

The learned Judge proceeded to state further as follows :

"By giving to the words 'imported into or exported from' their derivative meaning without any reference to the ordinary connotation of these words as used in the commercial sense, the decided cases in India have ascribed too general a meaning to these words which it appears from the setting, context and history of the clause was not intended. The effect of the construction of 'import' or 'export' in the manner insisted upon by the respondent would make rail-borne goods passing through a railway station within the limits of a municipality liable to the imposition of tax on their arrival at the railway station or departure therefrom or both which would not only lead to inconvenience but confusion, and would also result in inordinate delays and unbearable burden on trade both inter-State and intra-State. It is hardly likely that that was the intention of the Legislature. Such an interpretation would lead to absurdity which has, according to the rules of interpretation, to be avoided.........

Similarly the word 'export' has reference to taking out of goods which had become part and parcel of the mass of the property of the local area and will not apply to goods in transit *i.e.*, brought into the area for the purpose of being transported out of it. If the intention was to tax such goods then the word used should have been 're-exported' which means to export (imported goods) again; re-exportation means the exportation of imported goods."

In the result, the Supreme Court held that the terminal tax under section 66 (1) (*o*) of the C. P. and Berar Municipalities Act, 1922 is not leviable on goods which are in transit and are only carried across the limits of the Municipality.

13. The identical question again came up for consideration before the Supreme Court in *Town Municipal Council* v. *Urmilla Kothari*[1] There iron ore extracted from its mine heads in Hospet Taluka was brought over and stocked in Hubli Railyard by the Mysore Minerals Limited. M/s. Urmila Kothari the respondent before the Supreme Court used to lift the iron ore in trucks from Hubli Railyard and carry to Karwar and Belekeri harbours. The trucks carrying the iron ore have to pass in the course of transit the municipal town of Kalghatagi in the State of Karnataka. Under section 124 of the Karnataka Municipalities Act, 1964 any article or animal brought into the municipal limits for the purpose of immediate exportation may at the option of the importer not be subjected to levy of octroi if such article or animal be conveyed direct from the place of import

1. (1977) 1 S.C.J. 474: (1977) 2 S.C.R. 660; A.I.R. 1977 S.C. 873.

to the place of export by such routes, within such time, and under such supervision as the municipal council may by resolution determine. Rule 26 made under the Act provides that in case the person bringing the goods wishes to transport the goods at once beyond the limits of the municipality he shall do so only after obtaining a transport permit in Form IV, on payment of a fee of rupees two for each lorry and rupee one in other cases in the case of a city municipal council and rupee one for each lorry and fifty paise in other cases in the case of a town municipal council. Acting on these provisions the Kalghatgi Municipal Council on the basis of the resolution passed by it and approved by the State Government levied a fee of Re. 1 per truck of M/s. Urmilla Kothari under section 124 of the Act read with rule 26 of the rules. As already stated, the trucks were being used to carry iron ore from Hubli Railyard to Karwar and Belekeri harbours. It is in this context the learned Judges of the Supreme Court happened to consider the implication of the words 'import into and export from' the municipal limits of any article or animal. Jaswant Singh, J., enunciated the law thus :

> "The opening words of section 124 of the Act viz., 'and article or animal brought into the municipal limits for the purpose of immediate exportation on the construction of which the upshot of the case depends are very important. They imply processes of 'importing into' and 'exporting from' the municipal limits of goods or animals and are indicative of an element of repose and rest of the goods within the municipal limits. As rightly held by the Division Bench of the High Court, the expression 'brought into' and 'immediate exportation' do not comprehend within their sweep the continuous process of transit of goods, by vehicles which merely use the State highways passing through the areas which lie within the municipal limits. In the instant case, the iron ore is carried in the trucks of the respondent which merely pass through the areas which lie within the municipal limits and is not unloaded and reloaded at any place within the municipal limit. As such, the important element of repose and rest which the words 'brought into the municipal limits for the purpose of immediate exportation' imply is absent in the instant case,"

After referring to *Empress Mills* v. *Municipal Committee, Wardha*[1] the learned Judge observed:

> "The enunciation of law in the above case fully covers the present case. In the present case also, the iron ore which is in transit from Railyard at Hubli to Karwar and Belekeri harbours can hardly be characterised as goods brought into or exported from the municipal limits of Kalghatgi becuase they are neither imported into nor exported from any point within the municipal limits but are merely carried across a particular stretch of territory or across a particular area with the object of being transported to its ultimate destination."

14. The learned Judge finally observed that the continuity or continuous process of the carriage of iron ore is not in any way in fact broken within the municipal limits of Kalghatgi and that the respondent Urmilla Kothari could not be said either to bring in or export the iron ore as contemplated by section 124 of the Act read with rule 26 of the Rules and as such was not liable to pay the octroi or what was styled as 'supervision fee'. The learned Judge added that a contrary interpretation would make rail borne goods passing through the railway stations within the limits of the municipality liable to the imposition of the fee on their arrival at the railway stations and departure therefrom which would not be the intention of the Legislature.

15. The above decisions are clearly applicable to the facts of the case in the appeals before us. The learned Advocate-General submits that the two Supreme Court decisions above referred to are distinguishable in the sense that they deal with taxing statutes which called for a stricter interpretation of the words 'import into and export from', while the Act with which we are concerned is a regulatory one which by virtue of the objects set out in the preamble calls for a broader interpretation of these words. We are unable to agree. The very purpose of the Act as is evident from section 3 is to maintain the reputation of cotton grown in any area by prohibiting the import of cotton or of any specified kind of cotton into the area by rail, road, river or sea. Thus, a restriction is sought to be imposed on the import of cotton into the

1. 1958 S.C.J. 604; A.I.R. 1958 S.C. 341.

prohibited area. We are therefore of the opinion that the meaning given to the word 'import' by the Supreme Court in the decisions referred to above applies to the present case. In the circumstances we agree with the learned counsel for the appellants and hold that the appellants cannot be said to import the cotton bales into the protected area as difined in the Act when they are only in the course of transit from the place of manufacture outside Tamil Nadu into the various factories in Kerala. In this view, we hold that the appellants are not bound to take out licences in the Form 'GG' as required by the District Agricultural Officer (Certification and Enforcement), Tiruppur. The amended rule 6 (1) in so far as it states that a licence should be obtained in respect of cotton 'passing through the protected area to unprotected area' is beyond the powers conferred on the rule making authorities under section 7 (1) of the Act in so far as it compels a person to take out a licence in respect of cotton 'passing through the protected' area 'to any unprotected area.' The appellants are not bound to take out a licence so long as the cotton bales are only in the course of transit from outside the State of Tamil Nadu through the protected area in Tamil Nadu to their respective destinations in Kerala State. We however make it clear that it is necessary for the appellant to inform the respondents in writing before the transport of the cotton bales through the protected area in Tamil Nadu that the bales are not intended for import into any of the protected area within the State of Tamil Nadu, but are only meant to pass through the protected area in the course of transit from the place of consignment outside Tamil Nadu to their respective destinations in the State of Kerala. We accordingly set aside the orders of the learned single Judge and allow the appeals. In the result, we direct that the respondents be restrained from insisting on the appellants to take out licences in respect of cotton bales which pass through the protected area in the State of Tamil Nadu in the course of their transit from outside the State to their respective destinations in the State of Kerala. There will be no order as to costs.

R.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Ramaiah Thevar .. *Petitioner**

v.

Shanmugavel Thevar and others. .. *Respondents.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), *section* 37 (1)—*Suit for partition and possession—Averments in plaint of plaintiff being in joint possession—Defendants setting up ouster—Principles applicable as to valuation and payment of Court-fees.*

Held: The Court below has committed an error in deciding the matter as it did without adhering to the well-recognised principles as to valuation and payment of Court fees in suits of the present nature. Admittedly no evidence oral or documentary has been placed before the Court below for consideration on the question, and the trial Court has not proceeded on other issues. It is well accepted that in these matters the plaint allegations are the deciding factor. It has not been stated anywhere in the plaint that the plaintiff has been excluded from joint possession. There seems to be no exchange of notices, indicating the existence of a dispute anterior to the suit, as to the plaintiff's claim for joint possession. It is true the defendants 1 and 4 have filed written statements, denying the plaintiff's joint possession. But the plaintiff has filed reply statements and he has not given up his case of joint possession. Then it becomes incumbent for the Court at the full-fledged trial of the suit, to consider the question as to whether there has been an actual ouster as pleaded by the defendants. If after the fullfledged trial, the Court comes to the conclusion that the plaintiff's case of joint possession in the plaint is not borne out by the evidence the course to be adopted is to dismiss the suit of the plaintiff, unless he amends the plaint suitably and pays the requisite Court fees under section 37 (*i*) of the Act. In such matters, it is not safe and advisible to decide the issue on a consideration of the pleadings alone without proper and sufficient materials disclosed and placed before the Court. In the present case no evidence has been adduced by the parties on this issue.

* C.R.P. No. 3243 of 1977. 19th July, 1978.

It cannot be stated that this issue is not interlinked with other issues.

[Para. 2.]

Cases referred to:—

Varadarajalu Reddiar v. *Venkatakrishna Reddiar*, (1958) 71 L.W. 249 : (1958) 1 M.L.J. 199; *Mohamed Yassin, In re.*, (1958) 1 M.L.J. 21: A.I.R. 1958 Mad. 573.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Shencottah dated 1st November, 1977 and made O. S. No. 18 of 1977.

T.R. Mani, for Petitioner.

A. Sivaji, for Respondent

The Court made the following

ORDER: The plaintiff in O. S. No. 18 of 1977 on the file of the District Munsif, Shencottah is the petitioner in the revision. The respondents herein are the defendants in the said suit. The plaintiff laid the suit for partition and separate possession of his one fourth share in the suit properties. The necessary averments that the plaintiff is in joint possession of the suit properties have been made in the plaint and the plaintiff valued the suit for the purposes of Court-fees and jurisdiction under section 37 (2) of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955, hereinafter referred to as the Act. Defendants 2 and 3 remained *ex parte*. The 1st defendant filed a written statement denying the right in and the joint possession of the suit properties, claimed by the plaintiff. The 4th defendant, who is an alienee of one of the items of suit properties from the first defendant, also raised a similar contest. On the pleadings various issues were framed and issue No.6 reads as follows : Whether the Court fee paid is correct? Obviously, defendants 1 and 4 seemed to have pressed for a decision on this issue, as a preliminary issue. The Court below by orders dated 1st day of November, 1977 rendered its decision on this issue and it held that the suit ought to have been valued under section 37 (1) of the Act; and directed the plaintiff to pay Court-fees under section 37 (i) of the Act. The present revision is directed against the orders of the Court below.

2. In my opinion, the Court below has committed an error in deciding the matter as it did without adhering to the well recognised principles as to valuation and payment of Court-fees in suits of the present nature. Admittedly no evidence, oral or documentary, has been placed before the Court below for consideration on this question; and the trial has not proceeded on the other issues. It is well-accepted that in these matters, plaint allegations are the determining factors. It has not been stated anywhere in the plaint that the plaintiff has been excluded from joint possession. There seems to be no exchange of notices, indicating the existence of a dispute anterior to the suit, to the plaintiff's claim for joint possession. It is true that the defendants 1 and 4 have filed written statements, denying the plaintiff's claim for joint possession. But the plaintiff has filed reply statements, and he has not given up his case of joint possession. Then it becomes incumbent for the Court at the full fledged trial of the suit to consider the question as to whether there has been an actual ouster as pleaded by the defendants. If after the full-fledged trial, the Court comes to the conclusion that the plaintiff's case of joint possession in the plaint is not borne out by the evidence, the course to be adopted is to dismiss the suit of the plaintiff. unless he amends the plaint suitably and pays the requisite Court-fees under section 37 (i) of the Act. In such matters, it is not safe and advisable to decide the issue on a consideration of the pleadings alone without proper and sufficient materials disclosed and placed before Court. In the present case no evidence has been adduced by the parties on this issue. It cannot be stated that this issue is not interlinked with other issues.

3. Panchapakesa Ayyar, J. in *Varadarajulu Reddiar* v. *Venkata Krishna Reddiar and others*[1] observes as follows :—

> "Then, the learned Additional Government Pleader urged that whenever a reply notice to the person seeking partition, denies his right to partition and denies joint possession of the properties, that will be enough to bring into operation section 7 (*xiv*) (*b*). The argument is un-sustainable. In the majority of partition suits, a reply

1. (1958) 71 L.W. 249: (1958) 1 M.L.J. 199.

notice will deny the right to partition and also deny joint possession. For that reason to compel the plaintiff seeking partition to pay court-fee under section 7 (*iv*) (*b*), and to deprive him of the right given to him under the law of file a suit for partition, paying court-fee only on that basis will be unjustifiable and even illegal."

When such is the position even where there has been an exchange of notices, it will be unreasonable to conclude on the pleadings alone, that the plaintiff is excluded from joint possession, which he claims.

4. The reasoning of the Court below can be gathered from the following observations in its fair order :

"Therefore in respect of item 2 of the plaint schedule properties, ever since 8th June, 1955 the 4th defendant has been in possession and enjoyment of the same as nowhere it is denied that 4th defendant is not in possession of the same. Therefore the allegation of the plaintiff that he has been in possession and enjoyment of same along with the defendants 1. to 3 over the 2nd schedule properties also cannot be true. The 1st defendant claims right over the plaint schedule properties through the will executed by Shanmugavel Thevar. Therefore in view of the contentions raised by the parties, the plaintiff could not at all have been in possession and enjoyment of the suit properties with the first defendant as he claims right through under the will. Therefore, the Court-fee paid under section 37 (2) is not proper.

This reasoning ignores the principles set out above. Ramaswami, J. was facing a similar question on similar facts in the case of in *Mohamed Yassin,* In re[1] and the learned Judge observed that :

" Under the pretext of proper computations of Court-fees there cannot be a trial of a suit within a suit and this stage of the proceedings cannot be made the rehearsal of the suit ...."

Of course the learned Judge was dealing with a decision under section 12 of the Act at the instance of the defendant. But the principle can be applied even to a case, where this issue is sought to be decided, without evidence and materials to substantiate the same. I find the Court below has not properly appreciated and applied the above principles to the facts of the present case. In this view, I am inclined to interfere in revision and this revision is allowed. The order of the Court below on this issue No. 6 is set aside and the matter is left open to be decided at the full trial of the suit. But there will be no orders as to costs in this revision.

R.S. —— *Petition allowed.*

1. (1958) 1 M.L.J. 21: A.I.R. 1958 Mad. 573.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and A. Varadarajan, JJ.*

The New College, Madras-14, represented by its Secretary-cum-Correspondent, A.A. Rasheed and others. .. *Appellants**

v.

Basheer Mohammed and others .. *Respondents*

and

Basheer Mohamed and others .. *Appellants.*

v.

The Muslim Educational Association of Southern India represented by its Honorary Secretary, A.A. Rasheed and others ... *Respondents*

(A) *Civil Procedure Code (V of* 1908), *section* 92—*Muslim Educational Association—Managing and administering the New College, Madras—Public Religious and Charitable Trust—Registered under the Societies Registration Act—Suit against the Association basically for framing a scheme—Allegation of mis-management or mis-appropriation of funds of the Association by the Office bearers—Leave of Court to file suit asked for—Sanction accorded—Appeal against order granting leave—Whether maintainable!*

(B) *Letters Patent, Clause* 15—*Order granting leave under section* 92 *of the Code, whether a judgment.*

(C) *Wakf Act (XXIX of* 1954), *section* 55—*Consent in writing of the Board not obtained for filing the suit—Leave granted by the Court—Appeal—Objection, whether can be raised at the appellate stage.*

Clause 15 of the Letters Patent clearly confers a right of appeal against the judgment of a Single Judge of the High Court to the very same High Court itself. This right is subject to clause 44 of the Letters Patent which gives power to the Indian Legislature to restrict, amend or alter such right. Section 104, Civil Procedure Code, does not prohibit an appeal from an order granting leave under section 92, Civil Procedure Code. No doubt, the order of the nature of the one under appeal has not been made as one from which an appeal can be filed under section 104, Civil Procedure Code. If the order under appeal is construed as a 'judgment', the appeals are maintainable under clause 15 of the Letters Patent. The order granting leave under section 92, Civil Procedure Code is a 'judgment' as contemplated under Clause 15 of the Letters Patent. In the present case, the grant of leave definitely determines some right or liability of a party; such preliminary or interlocutory determination according to decided cases is a 'judgment'. As such, appeals are maintainable. The grant of leave, once for all decides the right of the plaintiffs to get the leave under section 92, Civil Procedure Code. This order, though preliminary or interlocutory in nature, definitely determines some right or liability of the parties to the suit. A reading of section 55 (2) of the Wakf Act would clearly show that the reliefs referred to in section 92, Civil Procedure Code cannot be claimed in respect of wakf property or such suit cannot be instituted before the consent in writing of the Board is obtained. This does not mean that the question of maintainability of the suit in view of section 55 (2) of the Wakf Act, cannot be agitated in the suit itself either as preliminary issue or along with other issues arising in the suit. The argument that section 63 of the Wakf Act, has been invoked by the Government for de-notifying the trust is countered by stating that the said section is not available for de-notifying a wakf already notified. [*Paras.* 18, 24 19, 23 *and* 25.]

It has been succinctly stated that to accord sanction under section 92, Civil Procedure Code, the Court has to look into the plaint allegations only for its satisfaction to grant or to refuse to grant the leave. [*Para.* 26.]

Cases referred to:—

Charan Singh v. *Darshan Singh*, (1975) 2 S.C.J. 164: (1975) 1 S.C.C. 298: (1973) 3 S.C.R. 48: A.I.R. 1975 S.C. 371; *Ganpati* v. *Pilaji*, A.I.R. 1956 Nag. 211; *Asrumati Debi* v. *Rupendra Den, Rajkot*, (1973) 1 M.L.J. 715: 66 L.W. 371: 1953 S.C.R. 1159: 1953 S.C.J. 300: A.I.R. 1953 S.C. 198; *Justices of the Peace for Calcutta* v. *The Oriental Gas Company*, (1872) 8 Beng. L.R. 433; *Tuljaram* v. *Alagappa*, (1912) I.L.R. 35 Mad. 1: 21 M.L.J. 1; *Shanti Kumar* v. *H Ins. Co., New York*, (1975) 1 S.C J. 187: (1975) 1 S.C.R. 550: A.I.R. 1974 S.C. 1719; *Abdul Kasim* v. *Mohamed Dawood*, (1963) 1 M.L.J. 281: I.L.R. (1963) Mad. 824: A.I.R. 1964 Mad. 247; *Palaniappa* v. *Krishnamurthy*, (1967) 2 M.L.J. 1: I.L.R. (1967)

*O.S.A. Nos. 82-86 and 87 of 1978 and Application No. 2231 of 1978. 19*th August*, 1978.

3 Mad. 227: 80. L.W. 329: A.I.R. 1968 Mad. 1 (F.B.); *Union of India* v. *S.S. Shanmuga Nadar*, (1958) 2 M.L.J. 419: 71 L.W. 651: A.I.R. 1959 Mad. 117; *M/s. Cork Industries* v. *A. Govindarajulu Mudaliar*, (1964) 2 M.L.J. 265: 77 L.W. 491: I.L.R. (1964) 2 Mad. 42: A.I.R. 1965 Mad. 87; *Vaghoji Kuverji* v. *Camaji Bomanji*, (1905) I.L.R. 29 Bom. 249; *Rasack Sahib* v. *Hamid Sait*, I.L.R. (1951) Mad. 228: (1950) 2 M.L.J. 282: 63 L.W. 759: A.I.R. 1951 Mad. 406.

Appeals under clause 15 of the Letters Patent and under Order 26, rule 1 of O. S. Rules against the order of Mr. Justice Padmanabhan, made in the exercise of the Ordinary Original Civil Jurisdiction of this Court dated 26th July, 1978 in Application No. 2231 of 1978.

N.S. Sivam and *Sriram Panchu*, for Appellants.

S. Raghavan and *K. N. Balasubramanian*, for Respondents.

The Judgment of the Court was delivered by

Gokulakrishnan, J.—The second defendant in un-numbered suit of 1978 who was the second respondent in Application No. 2231 of 1978 is the appellant in O.S.A. No. 82 of 1978. The third defendant in the said suit who was the third respondent in the said application is the appellant in O.S.A. No. 86 of 1978. The first defendant in the said suit who was the first respondent in the said application is the appellant in O.S.A. No. 87 of 1978. These three appeals arise from the order passed by Padmanabhan, J., in Application No. 2231 of 1978 on 26th July, 1978.

2. Application No. 2231 of 1978 was filed by plaintiffs 1 to 5 in un-numbered Civil Suit of 1978 on the file of the High Court (Ordinary Original Civil Jurisdiction) praying for the grant of leave to them for instituting the suit under section 92 of the Code of Civil Procedure. Padmanabhan, J., by his order in the said application, after observing that the question whether the first respondent has been notified to be a wakf by the Wakf Board and whether consequently the suit is not maintainable for want of prior sanction of the Wakf Board is a matter which has to be decided at the time of the trial and not at the stage of considering question whether leave should be granted for the institution of the suit under section 92, Civil Procedure Code and that *prima facie* respondents 1 and 2 do constitute public trusts, granted lease to the applicants to institute the suit under section 92, Civil Procedure Code. Aggrieved by the said order, the aforesaid defendants have preferred the respective appeals.

3. Mr. Govind Swaminathan, the learned counsel appearing for the appellant in O.S.A No. 82 of 1978 also argued for the appellants in O.S.A. Nos. 86 and 87 of 1978. The learned counsel submitted that sections 2, 4, 5 and 6 of Wakf Act, 1954 (XXIX of 1954) deal with the procedure in respect of declaring certain properties as Wakf properties, section 6 (4) of the said Act states that the list of wakfs published under sub-section (2) of Section 5 shall, unless it is modified in pursuance of a decision of the civil Court under sub-section (1) be final and conclusive. Section 55 (1) of the Act states:—

> "A suit to obtain any of the reliefs mentioned in section 92 of the Code of Civil Procedure, 1908, relating to any wakf may, notwithstanding anything to the contrary contained in that section, be instituted by the Board without obtaining the consent referred to therein".

Section 55 (2) states—

> "No suit to obtain any of the reliefs referred to in section 92 of the Code of Civil Procedure, 1908, relating to any wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board and for the institution of any such suit, it shall not be necessary to obtain the consent referred to in that section, notwithstanding anything contained therein."
>
> "Provided that nothing in this sub-section shall apply in relation to any such suit against the Board".

Referring to the abovesaid provisions, Mr. Govind Swaminathan submitted that when the suit itself cannot be filed as per the provisions contained in section 55 (2) without the consent in writing of the Wakf Board, inasmuch as the Muslims Educational Association of Southern India, situate at No. 49, Peters Road, Royapettah, Madras, has been notified as a wakf property as early as 20th May, 1959, the Court has no power to grant the sanction under section 92, Civil Procedure Code. The learned counsel further submitted that in view of section 4 of the Civil Procedure Code the special provisions contained in the Wakf Act only will apply to the present case and hence the grant of sanction under section 92, Civil Procedure Code, cannot be sustained. The

learned counsel, after referring to the observations of Padmanabhan, J., to the effect that the conclusion of the learned Judge was fortified by the fact that the Government have issued G.O. 3408, Revenue, dated 17th November, 1959, under which they have exercised their powers under section 63 of the Wakf Act and have directed that notices issued if any by the Wakf Board to the institutions registered under the Societies Registration Act be withdrawn forth, submitted that section 63 does not give power to the Government to de-notify a Wakf already notified. Section 63 of the Wakf Act states—

> "Subject to any directions on questions of policy issued under section 62, the State Government may, from time to time, give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with any such directions".

Referring to the above provision, Mr. Govind Swaminathan also referred to G.O. Ms. No. 3408, Revenue, dated 17th November, 1959, which states:

> "In exercise of the powers vested in them under section 63 of the Wakf Act, the Government accordingly direct that notices, if any issued by the Wakf Board to institutions aforesaid be withdrawn by them forthwith",

and submitted that such a power cannot be exercised under the provisions of section 63 of the Wakf Act and further there is absolutely nothing on record to show that the Wakf Board has withdrawn the notification issued by them relating to the Muslim Education Association of Southern India as early as 20th May, 1959.

4 Mr. K. N Balasubramanian, learned counsel appearing for the plaintiffs, in the appeals themselves are not maintainable either under clause 15 of the Letters Patent or under section 104 of the Code of Civil Procedure. According to the learned counsel, the order of Padmanabhan, J., cannot be construed as a 'judgment', and as per the provisions in section 104, Civil Procedure Code, an appeal will lie only if leave is refused under section 92, Civil Procedure Code. The learned counsel also submitted that under section 63 of the Wakf Act, the Government have power to direct the Wakf Board to denotify certain properties from the purview of the Wakf Act. According to the learned counsel, section 6 of the Wakf Act does not preclude a civil Court from deciding whether a particular property is or is not a wakf. Mr. K. N. Balasubramanian also referred to the decision of the Supreme Court in *Charan Singh* v. *Darshan Singh*[1] and submitted that the Court has to look into the plaint only for the purpose of deciding as to whether leave can be granted under section 92, Civil Procedure Code, or not. Finally, the learned counsel submitted that the question whether or not the Wakf Act is applicable to the trusts referred to in the plaint can be decided as a preliminary issue in the main suit itself and this cannot in any way come in the way of according sanction under section 92, Civil Procedure Code.

5. In reply, Mr. Govind Swaminathan, the learned counsel appearing and arguing for the appellants, submitted that the question of maintainability of the suit can be only raised at the stage of grant of leave and not subsequently. As per section 55 (2) of the Wakf Act, no suit to obtain any of the reliefs referred to in section 92, Civil Procedure Code, relating to any wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board. Hence Mr. Govind Swaminathan submitted that the appellants have to question the right to file the suit only at the time of grant of leave under section 92, Civil Procedure Code and if not, a statutory right granted to them will be very much affected. Various decisions were cited on the question of maintainability of the appeals against the order granting sanction under section 92, Civil Procedure Code.

6. Counsel for the appellants on record have made an endorsement to the effect that O.S.A. No. 82 of 1978 is not being pressed as against respondents 6 to 9 therein, and O.S.A. Nos. 86 and 87 of 1978 are not being pressed as against respondents 8 to 11 therein. Respondents 1 to 5 in all the appeals, who are the plaintiffs, are represented by Mr. K. N. Balasubramanian, Respondent No. 10 in O.S.A. No. 82 of 1978 is represented by Mr. Abdul Razack, while respondent 11 therein is represented by Mr. V.T. Arasu. Respondent 6 in O.S.A. Nos. 86 and 87 of 1978 is represented by Mr. Abdul Razack,

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1. (1975) 3 S.C.R 48: (1975) 1 S.C.C. 298: (1975) 2 S.C.J. 164: A.I.R. 1975 S.C. 371.

while respondent 7 in both the appeals is represented by Mr. Sivam.

7. We have been taken through the order of Padmanabhan, J., and also through the records filed before the Court below.

8. The main suit, in respect of which sanction has been accorded under section 92, Civil Procedure Code by the impugned order, is basically for framing a scheme for the proper administration and management of the first defendant Association and also for framing rules for the management of the second defendant College. Various other incidental reliefs, such as removing the third defendant from the Honorary Secretaryship of the first defendant Association and from the post of Secretary *cum* Correspondent of the second defendant College, and also taking of accounts are prayed for in the plaint. The plaintiffs' case, in a nutshell, is that they are Muslims and are interested in the proper administration and efficient management of the Muslim Educational Association of Southern India (first defendant) which in turn is managing and administering the New College, Madras (second defendant). The first defendant, according to the plaint, is a public religious and charitable trust and was established in the year 1902. It was registered under the Societies Registration Act in 1906. The aims and objects of the first defendant Association, as laid down in its Memorandum, are to devise means for disseminating higher education among Muslims and to promote the study of Urdu, Persian and Arabic; to arrange for imparting religious instruction side by side with secular education; to help the poor but intelligent and deserving, with scholarships, books, school fees, etc; to impress upon the minds of the Muslim public by means of lectures, and social gatherings, and to safeguard and promote the rights and interests of the Muslim community in all spheres of life, especially religious, educational, cultural, social and economic. The first defendant is a trust created for the Muslim community which forms a section of the general public and is of a charitable and religious nature.

9. The plaint alleges that the office-bearers of the first defendant Association are the President, six Vice-Presidents, Honorary Secretary, Treasurer, three Assistant Secretaries and an Honorary Assistant Treasurer, all elected from among individual members of the Association; 42 other members elected by the General Body of the Association at the annual general body meeting, a legal adviser, the immediate past President and the immediate past secretary. The management of the Association and all its movable and immovable properties are vested in the Executive Committee by virtue of the Rules of the Association. Under clause 16 of the Rules, the Executive Committee should maintain and manage the New College, Madras (second defendant) in accordance with the terms contained in the Deed of Trust relating to it; manage the scholarships and other endowments and institutions that have been or hereafter may be entrusted to the first defendant Association; administer the scholarship donations or other funds that may be paid to the Associcetion; arrange for election of representatives to the Senate of the Madras and Annamalai Universities and undertake any other work calculated to advance Muslim education in Southern India. Under the Rules, it is the Secretary of the first defendant Association who is in complete charge and management of the affairs of the first defendant Association and also the second defendant College. Under the Rules, the affairs of the second defendant College shall be managed and controlled by the Managing Committee consisting of 9 members, of whom three would be *ex-officio* members, *viz*, the President and the Secretary of the first defendant Association and the Principal of the College, one member nominated to it by the Syndicate of the Madras University and five members elected by the Executive Committee of the first defendant Association. The Rules further provide that the President and the Secretary of the first defendant Association shall be the Chairman and the Secretary *cum* Corresponent of the second defendant College. The management of the second defendant College is thus vested with the Managing Committee consisting of the 9 members as stated supra.

10. It is further stated in the plaint that by the terms of the Registered Deed of Declaration of Trust dated 7th April, 1953, the Executive Committee of the first defendant Association transferred the premises consisting of land and building of an extent of about 210 grounds and 1990 sq. ft. bearing old Door No. 41-B and new Door No. 49, Peters Road, Royapettah, Madras-14 and another property bearing Door No. 11, Singanna Naicken Street, George Town, Madras-1, of an extent of 2 grounds and 767 sq. ft, in favour of the Managing Committee of the second defendant College, in trust for the

second defendant, for the proper conduct, maintenance and financial stability of the second defendant College. A copy of the Memorandum of Rules of the first defendant has been produced as Document No. 1; a copy of the Rules of the second defendant College has been produced as Document 2 and a copy of the Deed of Declaration of Trust has been produced as Document 3 along with the plaint.

11. The plaintiffs would allege that the third defendant, A.A. Rasheed, was first elected as the Honorary Secretary of the first defendant Association for one year from 1965 in the general body meeting of the first defendant. He was again re-elected for two more terms. In 1969 the Rules were amended, in and by which the terms of office of any office-bearer or Committee Member of the Association was extended to three years, providing for re-election of the retiring office-bearer or committee member for yet another term of three years for the same office. Pursuant to the amended Rules, the third defendant was re-elected to the post of Honorary Secretary of the first defendant Association for a term of three years and again after the expiry of the said period, for a further term of three years. The third defendant was in chasge of the collection of all donations made to the Association and College by patrons, educationalists, other members of the public and philanthropists. He has been collecting donations ever since he was elected to the post of Honorary Secretary in 1965 till to date.

12. The plaintiffs have specifically alleged in the plaint that the third defendant, with a view to perpetuate his term of office as Honorary Secretary of the first defendant Association, started enrolling ordinary and life members from his relations, friends and employees so as to strengthen his position and get a majority in the first defendant Association. The third defendant, out of the donations made to the College and the Association, instead of crediting the amounts in the accounts of the College and Association as such donations in the names of the respective donors, entered the names of his own henchmen and psychophants as ordinary and life members of the Association fraudulently making it appear as though the amounts were paid by the persons whose names he entered in the registers as members. Thus the third defendant misused and misappropriated the funds of the first defendant Association and second defendant College, and is liable to account for the same. The third defendant has been in charge of the day to day affairs of the second defendant College ever since 1965. He is responsible for the collection of tuition and other fees from the students of the second defendant College.

13. The plaintiffs would further allege in the plaint that owing to the rumours that the third defendant misappropriated large funds, a committee of three members consisting of Mr. Habibullah Badsha, Dr. Syed Khaleefathullah and Dr. J. Azeez-ur-Rahman was constituted and the said committee went through the accounts and vouchers of the College and the counterfoils of the receipts issued by the College, for only a short period of fourteen months at random in the academic years 1974-75 and 1975-76. According to the plaint, the committee was shocked to know of the startling facts, *viz.*, that amounts for which receipts had been issued for the collection of fees from the students did not tally with the daily fee collection register, and in the said period of fourteen months a sum of about Rs. 72,000 did not find a place in the daily fee collection register for which receipts had been issued; that on the expenditure account of the College entries to the extent of Rs. 32,642.84 purported to have been paid in cash were found without any supporting vouchers and the entries for the said sum in the accounts simply mentioned as towards air-conditioning account without any particulars or supporting vouchers in the accounts, though the amount in question was a substantial one. Apart from the abovesaid findings by the committee, the plaint alleges in paragraph 15 thereof as many as 19 instances wherein the third defendant has allegedly mismanaged and mis-appropriated the College funds. According to the plaintiffs, the third defendant, with the active connivance of defendants 4 and 5, mis-appropriated all these amounts. After further narrating various other irregularities, mis-appropriations and mismanagement as having been committed by the third defendant, they aver that the Memorandum and Rules governing the management of the second defendant College do not provide sufficient safeguards from such malpractices and/or mismanagement of the said institution by any office-bearer, that the affairs of the second defendant College are in absolute chaos, which will utlimately result in complete ruination of the first defendant Association and that if the second defendant College is left in the management of the present committee and the third defendant it will go to ruin.

14. With the abovesaid allegations the plaintiffs have come forward with the suit and

would seek leave of the Court under section 92, Civil Procedure Code, forinstituting the suit by means of an Application No. 2231 of 1978 alleging acts of irregularities, mismanagement and misappropriation on the part of the third defendant in relation to these public charitable trusts.

15. The third defendant A.A. Rasheed filed a counter-affidavit denying all the allegations and reserving his detailed statement on the plaint at the appropriate time. Regarding the permission sought for under section 92, Civil Procedure Code, he has stated that there is no case for granting permission when the entire charges are against one person and are motivated. He has also contended that the plaintiffs have not come with clean hands, that the first defendant-Association is a notified wakf and that therefore no suit under section 92, Civil Procedure Code, can be filed without getting the consent of the Wakf Board under section 55 of the Wakf Act. The second defendant is not a trust and hence the reliefs asked for in respect of the second defendant cannot come within the purview of section 92, Civil Procedure Code.

The third defendant's further contentions *inter alia* are as follows

Without alleging or setting out any charges in respect of the management of the first defendant, the plaintiffs cannot come forward with the plea for framing a scheme. The conditions stipulated in section 92, Civil Procedure Code, have not been satisfied and hence the suit cannot be entertained. The first defendant is not a trust within the meaning of section 92, Civil Procedure Code, since it has been registered under the Societies Registration Act. The purpose of a society may be charitable but that does not convert the Society into a trust. There are ample provisions available under the Rules of the first defendant Association to take action in respect of the alleged irregularities. The rules and regulations of the College amply provide for guarding against malpractices and mismanagement. The College is running smoothly under the administration of the third defendant. The chaos created was due to the efforts of a few disgruntled members to have the third defendant removed. The reliefs asked for in the plaint are outside the scope of section 92, Civil Procedure Code.

16. As we have seen in the paragraphs supra, Padmanabhan, J., after perusing the plaint, affidavit. counter-affidavit and also the documents filed, granted leave to the plaintiffs to institute the suit under section 92, Civil Procedure Code, on being satisfied *prima facie* that respondents 1 and 2 are public trusts and the proposed suit relates to the said public trusts.

17. We have already set out the arguments advanced by the respective counsel in these appeals, in the foregoing paragraphs. We will first take up the question of maintainability of those appeals. Section 104, Civil Procedure Code, *inter alia* provides:

> "An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders.............
>
> (*ffa*).... order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be..... "

Mr. K.N. Balasubramanian, the learned counsel, contended that inasmuch as Padmanabhan, J., has granted leave under section 92, Civil Procedure Code, the appeals are not maintainable as per the provision in section 104 (*ffa*), Civil Procedure Code. To the reference made to clause 15 of the Letters Patent by Mr. Govind Swaminathan, the learned counsel, in support of the submission that an appeal shall lie to the High Court from the judgment of one Judge of the High Court itself, Mr K.N. Balasubramanian submitted that such an appeal is available only against a 'judgment' and not an 'order' granting leave under section 92, Civil Procedure Code.

Ganpati v *Pilaji*[1] a Division Bench Judgment of the Nagpur High Court, specifically states that section 104, Civil Procedure Code, applies to appeals to High Court from Courts subordinate to it and it does not deal with appeals from a Single Judge of the High Court to a Bench under the Letters Patent. It further states that an appeal from the judgment of a Single Judge of the High Court is provided by clause 10 of the Letters Patent of the Nagpur High Court, which is analogous to clause 15 of the Letters Patent of the Madras High Court, and such an appeal cannot be

1. A.I.R. 1956 Nag. 211.

said to be barred under section 104, Civis Procedure Code in the absence of an expres provision. On the other hand, such an appeal can be filed under clause 15 of Letters Patent by virtue of section 4 of the Civil Procedure Code.

18. Clause 15 of the Letters Patent clearly confers a right of appeal against the judgment of a Single Judge of the High Court to the very same High Court itself. This right is subject to clause 44 of the Letters Patent which gives power to the Indian Legislature to restrict, amend or alter such right. Section 104, Civil Procedure Code does not prohibit an appeal from an order granting leave under section 92, Civil Procedure Code. No doubt, the order of the nature of the one under appeal has not been made as one from which an appeal can be filed under section 104, Civil Procedure Code. If the order under appeal is construed as a 'judgment', the appeals are maintainable under clause 15 of the Letters Patent. The order granting leave under section 92, Civil Procedure Code in our view, is a 'judgment' as contemplated under clause 15 of the Letters Patent. One view is fortified by the decision rendered by the Supreme Court in *Asrumati Debi* v. *Rupendra Den, Rajkot.*[1] In that case, it has been held that an order under clause 13 of the Letters Patent of the Calcutta High Court allowing an application for transfer of a suit to the High Court to be tried in its Extraordinary Original Civil Jurisdiction is not a "judgment" within the meaning of clause 15 of the Letters Patent for purposes of appeal. While dealing with the said case, the Supreme Court considered the meaning of the word "judgment" and also the conflicting decisions thereon. The Supreme Court also referred to the case of the *Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[2] and to the following observations of the Chief Justice of Calcutta therein:

> "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them bring that a final judgment determines the whole cause or suit, and a preliminary for interlocutory judgment determines only a part of it, leaving other matters to be determined".

1. (1953) 1 M.L.J. (S.C.) 710: 66 L.W. 371: 1953 S.C.R. 1159: 1953 S.C.J. 300: A.I.R. 1953 S.C. 198.
2. (1872) 8 Beng. L.R. 433.

Proceeding further, the Supreme Court also referred to the decision in *Tuljaram* v. *Alagappa*[1] and to the observations of Sir Arnold White, C.J., therein—to find out whether an order is a 'judgment' or not, in the following words—

> "We have to look to its effect upon the particular suit or proceeding in which it is made. If its effect is to terminate the suit or proceeding, the decision would be a 'judgment' but not otherwise......."

The learned Chief Justice qualifies the general proposition laid down above by stating that

> "an adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of the Letters Patent".

The Supreme Court, after considering the above two decisions, held that an order under clause 13 of the Letters Patent, which is for transferring a suit, does not satisfy the test of a 'judgment' as formulated by the above said two decisions of the High Courts. Proceeding further, the Supreme Court observed—

> "On the other hand, an order of transfer under Clause 13 of the Letters Patent, is in the first place, not at all an order made by the Court in which the suit is pending. In the second place, the order does not put an end to the suit which remains perfectly alive and that very suit is to be tried by another Court, the proceedings in the latter, to be taken only from the stage at which they were left in the Court in which the suit was originally filed".

The Supreme Court also distinguished in that case an order for transfer and an order rescinding or refusing to rescind leave to sue granted under clause 12 of the Letters Patent (of the Calcutta High Court). According to the Supreme Court, the order rescinding or refusing to rescind leave to sue granted under clause 12 of the Letters Patent is a 'judgment' coming within the purview of clause 15 of the Letters Patent.

1. (1912) I.L.R. 35 Mad. 1: 21 M.L.J. 1.

19. In the present case, the grant of leave definitely determines some right or liability of a party. Such preliminary or interlocutory determination, according to *Justices of the Peace for Calcutta* v. *The Oriental Gas Company*,[1] and *Asrumati Debi* v. *Kumar Rupendra Deb, Rajkot*,[1] is a 'judgment'. This view in *Justices of the Peace for Calcutta* v. *The Oriental Gas Company*,[2] found favour with the Supreme Court and was followed in *Tuljaram* v. *Alagappa*.[3] No doubt, the Supreme Court approved the observations of the Chief Justice in *Tuljaram* v. *Alagappa*,[3] in the following words—

> "an adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of Letters Patent".

20. *Shanti Kumar* v. *H. Ins. Co., New York*,[4] deals with the definition of 'judgment' which alone enables the affected party to prefer an appeal under Letters Patent In that decision, the Supreme Court has held that when an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a 'judgment' within clause 15 of the Letters Patent; it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation, and it is the final decision as far as the trial Court is concerned. Discussing on this aspect, the Supreme Court noticed the decision rendered in *Asrumati Debi* v. *Rupendra Deb*[2] wherein an argument was advanced that if an order refusing to rescind leave to sue granted under clause 12 of the Letters Patent was a 'judgment under clause 15 of the Letters Patent then there was no difference in principle between an order of that description and an order transferring the suit under clause 13 of the Letters Patent. On this argument, the Supreme Court in *Asrumati Debi's case*[2] held that if leave under clause 12 of the Letters Patent was rescinded the suit would come to an end and if an order was made refusing to rescind the leave the result would be on a vital point adverse to the defendant and it would go to the root of the suit and become final and decisive against the defendant so far as the Court making the order was concerned. Quoting the decision in *Asrumati Debi's case*[1], the Supreme Court observed in *Shanti Kumar* v. *H. Ins. Co., New York*,[2] that "in finding out whether any decision is a judgment within the meaning of clause 15 of the Letters Patent each case must be looked into in order to find out as to whether there is a decision determining the right or liability of the parties affecting the merits of the controversy between the parties". The Supreme Court also referred to *Tuljaram* v. *Alagappa*,[3] wherein our High Court has stated thus:—

> "If the effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a 'judgment'."

After quoting these decisions and observing that

> "The views of the High Courts at Calcutta and Madras with regard to the meaning of 'judgment' are with respect preferred to the meaning of 'judgment' given by the Rangoon and Nagpur High Court",

the Supreme Court held—

> "The right to claim that an introduction of a cause of action by amendment is barred by limitation is founded on immunity from a liability. A right is an averment of entitlement arising out of legal rules. A legal right may be defined as an advantage or benefit conferred upon a person by a rule of law. Immunity in short is no liability. It is an immunity from the legal power of some other person. The correlative of immunity is disability. Disability means the absence of power. The appellant in the present case because of the limitation of the cause of action has no power to render the respondent liable for the alleged claim. The respondent has acquired by reason of limitation immunity from any liability."

Ultimately, the Supreme Court held—

> "In finding out whether the order is a judgment within the meaning of clause 15 of the

1. (1872) 8 Beng. L.R. 433.
2. 1953 S.C.J. 300: (1953) 1 M.L.J. 710 (S.C.).
3. (1912) I.L.R. 35 Mad. 1: 21 M.L.J. 1.
4. (1975) 1 S.C.J. 187: (1975) 1 S.C.R. 550: A.I.R. 1974 S.C. 1719.

1. 1953 S.C.R. 1159: 1953 S.C.J. 300: 66 L.W. 371: (1953) 1 M.L.J. (S.C.) 710: A.I.R. 1953 S.C. 198.
2. (1975) 1 S.C.J. 187: A.I.R. 1974 S.C. 1719.
3. (1912) I.L.R. 35 Mad. 1: 21 M.L.J. 1.

Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability."

No doubt, the decision of a Division Bench of our High Court in *Abdul Kasim* v. *Mohamed Dawood*[1] states—

"........It is conceded that the Board (Wakf Board) can under the provisions of section 55 (1), even without an enquiry file a suit for any or all the reliefs under section 92 of the Civil Procedure Code. If the Board can do that even in a case where the Advocate-General has not considered the matter, there will be less reason for an enquiry where there is his sanction. It follows that a consent given by the Wakf Board under section 55 (2) neither involves an adjudication of rights of parties, nor need it be given after an enquiry or on the basis of any judicial adjudication. The question is more or less one of expediency of permitting a suit to be filed. Such a duty on the part of the Board cannot be regarded as a quasi-judicial act to entitle this Court to interfere under Article 226 (of the Constitution of India)."

Thus, in the above decision the Division Bench while considering whether a *rule nisi* under Article 226 of the Constitution can issue calling upon the Wakf Board to produce its records with a view to quash its order under section 55 (2) of the Wakf Act, held that the consent given by the Wakf Board under section 55 (2) cannot be considered as a quasi-judicial act. Incidentally, the Division Bench also referred to the sanction to be given by the Advocate-General under section 92, Civil Procedure Code.

21. Apart from the fact that power given to the Advocate-General has now come to vest with the Court concerned, the decisions rendered in *Asrumathi Debi* v. *Rupendra Deb*[2] and *Shanti Kumar* v. *H. Ins. Co., New York*[3] make it clear that the nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability. In *Asrumathi's case*[1] it has been held that if leave under Clause 12 of the Letters Patent was rescinded the suit would come to an end and if an order was made refusing to rescind the leave the result would be on a vital point adverse to the defendant and it would go to the root of the suit and become final and decisive against the defendant so far as the Court making the order was concerned.

22. Considering the observations made by the Supreme Court and also the fact that the power has now come to vest with the Court, it is clear that if leave to institute the suit is granted, the defendants are losing the right to prohibit the plaintiffs in getting the sanction under section 92, Civil Procedure Code thereby preventing them from proceeding with the suit.

23. The grant of leave, in question before us, once for all decides the right of the plaintiffs to get the leave under section 92, Civil Procedure Code and negatives the contention of the appellants that leave should not be granted. This order, though preliminary or interlocutory in nature, definitely determines some right or liability of the parties to the suit.

24. In this connection we can usefully quote the decision in *Palaniappa* v. *Krishnamurthy*[2] where, a Full Bench of our High Court while dealing with *Asrumathi Debi* v. *Kumar Rupendra Deb Raikot*[1] has observed—

"From the Supreme Court decision, it appears to us that four tests can be clearly formulated, and not merely two, as was thought to be the case by the Division Benches of this Court in *Union of India* v. *S.S. Shanmugha Nadar*[3] and *M/s. Cork Industries* v. *A. Govindarajulu Mudaliar.*[4] Three of those tests may be termed as tests of a positive character, and the last is really negative but there can be no doubt that it also has relevance and force. The tests are: (1) whether

1. (1963) 1 M.L.J. 281: I.L.R. (1963) Mad. 824: A.I.R. 1964 Mad. 247.

2. 1953 S.C.J. 300: (1953) 1 M.L.J. 710: A.I.R 1953 S.C. 198.

3. (1975) 1 S.C.J. 187: A.I.R. 1974 S.C. 1919.

1. 1953 S.C.J. 300: (1953) 1 M.L.J. 710: A.I.R 1953 S.C. 198.

2. (1967) 2 M.L.J. 1: I.L.R. (1967) 3 Mad. 227: 80 L.W. 309: A.I.R. 1968 Mad. 1.

3. (1958) 2 M.L.J. 419: 71 L.W. 651: A.I.R. 1959 Mad. 117.

4. (1964) 2 M.L.J 265: 77 L.W. 491: I.L.R. (1964) 2 Mad. 42: A.I.R. 1965 Mad. 87.

the order or judgment of the single Judge terminates the suit or proceedings? (2) Whether it affects the merits of the controversy between the parties in the suit itself? (3) A test that can be considered as a refinement of test. No. 2, but which upon juristic principle should be separately stated, namely, whether it determines some right or liability as between the two parties? and (4) the negative test that has found express recognition in the dicta of White, C.J., with reference to *Vaghoji Kuverji* v. *Camaji Bomanji*[1] and has not been disapproved by their Lordships of the Supreme Court in *Asrumati Devi* v. *Kumar Rupendra Deb Raikot*[2] but which, instead, would appear to have been impliedly approved, namely, whether, apart from actual order in the *lis* or proceeding, 'a conceivable order', or an order to the contrary effect, would have disposed of the suit and would come within the definition of 'judgment'? Very simply stated, since the order declining leave to sue in *forma pauperis* is indisputably a 'Judgment' and is appealable, an order granting leave in the same *lis* or proceeding, determining the same right and liability, would also be a 'judgment', for the simple reason that the other possible order would have terminated the suit itself. The difficulty with regard to the acceptance of the test in *M/s. Cork Industries* v. *A. Govindarajulu Mudaliar*[3] is that only two tests are formulated, and there is no reference at all to the test of a 'conceivable order' in the *lis*, which would terminate the proceeding".

Considering the principles laid down in the abovesaid decisions, we are of opinion that the order granting leave under section 92, Civil Procedure Code is a 'judgment' coming within the meaning of Clause 15 of the Letters Patent and as such the appeals are maintainable.

25. Mr. Govind Swaminathan, the learned counsel appearing for the appellants strenuously argued that section 55 of the Wakf Act (XXIX of 1954) is a clear bar to the suit since no consent in writing of the Board has been obtained for filing a suit. According to Mr. Govind Swaminathan, this contention can be raised at the stage when leave is sought under section 92, Civil Procedure Code and the same cannot be raised subsequent to the entertainment of the suit. A reading of section 55 (2) of the Wakf Act would clearly show that the reliefs referred to in section 92, Civil Procedure Code cannot be claimed in respect of wakf property or such suit cannot be instituted before the consent in writing of the Board is obtained. This does not mean the question of maintainability of the suit in view of section 55 (2) of the Wakf Act, cannot be agitated in the suit itself either as a preliminary issue or along with other issues arising in the suit. The argument that section 63 of the Wakf Act has been invoked by the Government for de-notifying the trust is countered by stating that the said section is not available for de-notifying a wakf already notified. These contentions, in our opinion, are however, matters to be decided at the time of the trial and not at the stage of considering the question whether leave should be granted for instituting the suit under section 92, Civil Procedure Code. We make it clear that the observations of Padmanabhan, J., to the effect that the conclusion of the learned Judge is fortified by the fact that the Government has issued G.O. Ms. No. 3408, Revenue, dated 17th November, 1959, under which they have exercised their powers under section 63 of the Wakf Act and have directed that notices issued if any by the Wakf Board to the institutions registered under the Societies Registration Act be withdrawn forthwith, cannot be taken as upholding the de-notification alleged in the plaint. We also make it clear that the question is at large and can be agitated at the trial of the suit. When we say trial of the suit, we mean either at the time of deciding the preliminary issue or while finally disposing of the suit.

26. The learned Judge went into the documents which were filed along with the plaint as document Nos. 1 to 3 and *prima facie* got satisfied that the first and second defendants do constitute public trusts and that the proposed suit relates to those trusts. We have also perused the copy of the Memorandum of Rules of the first defendant, which is document No. 1, copy of the Rules of the second defendant College which is document No. 2 and copy of the Deed of Declaration of Trust which is document No. 3. These documents read with the serious allegations levelled against the third defendant in the plaint *prima facie* establish that the first and second defendants constitute public trusts and the serious allegations made

1. (1905) I.L.R. 29 Bom. 249.

2. 1953 S.C.J. 300: (1953) 1 M.L.J. 710: A.I.R. 1953 S.C. 198.

3. (1964) 2 M.L.J. 265: 77 L.W. 491: I.L.R. (1964) 2 Mad. 42.

in the plaint against the third defendant, if ultimately proved, will be sufficient for removing him from the office of secretary-ship of the first defendant as well as of the second defendant College. It has been succinctly stated that to accord sanction under section 92, Civil Procedure Code the Court has to look into the plaint allegations only for its satisfaction to grant or to refuse to grant the leave. In *Rasack Sahib* v. *Hamid Sait*[1] a Bench of this Court has categorically stated—

> "It is well-settled that, to determine whether a suit falls within section 92 of the Code of Civil Procedure, we have to look at the plaint and the allegations therein and not to the written statement."

This statement of law has been reiterated in *Charan Singh* v. *Darshan Singh*[2], wherein the Supreme Court has observed that it is well-settled that the maintainability of the suit under section 92, Civil Procedure Code depends upon the allegations in the plaint and does not fall for decision with reference to the averments in the written statement. Inasmuch as we are *prima facie* satisfied on the plaint allegations that the first and second defendants do constitute public trusts and that the proposed suit relates to the said public trusts, the leave granted to the plaintiffs to institute the suit under section 92, Civil Procedure Code is in order.

27. In these circumstances, and with the abovesaid observations, these appeals are dismissed with costs Counsel's fee: one set.

R.S. —— *Appeals dismissed.*

1. I.L.R. (1951) Mad. 228: (1950) 2 M.L.J. 282: 63 L.W. 759: A.I.R. 1951 Mad. 406.
2. (1975) 2 S.C.J. 164: A.I.R. 1975 S.C. 371.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*V. Sethuraman, J.*

Kandaswamy Koundar .. *Appellant**

v.

Thirumurthy Goundar and another .. *Respondents*

Civil Procedure Code (V of 1908), Order 2) rule 18—Suit for partition—Interim final decree passed on 14th February, 1959—Final decree passed on 28th February, 1973, directing mesne profits to be paid—Validity of final decree questioned—Final decree held valid.

In a suit for partition, there was a preliminary decree on 25th January, 1950. On 11th February, 1957, the plaintiff applied for passing of the final decree. An interim final decree was passed on 14th February, 1959. On 28th February, 1973, there was a final decree directing mesne profits being paid at the rate of Rs. 500 per annum from 14th December, 1958, till date of delivery of possession. The second defendant challenged the validity of the final decree on the ground that there could be only one final decree.

Held: In the present case, the decree dated 14th February, 1959, was itself in the nature of an *interim* final decree. *Ex facie* it stated that it was not a final decree disposing of the suit *in toto*. Against that decree there was an appeal and that appeal was dismissed. Therefore what was subsequently passed was only a continuation of the said final decree proceedings and it was then that the suit got terminated. In these circumstances, there was no infirmity in the order of the Court below in giving the direction regarding the sum of Rs. 500 as mesne profits per annum. [*Para.* 3.]

The two provisions in Order 20, rule 18 and rule 12, Civil Procedure Code were designed to meet different situations. Therefore, the restriction contained in Order 20, rule 12 sub-rule (1) (*c*) will not apply to partition suits, which are governed by Order 20, rule 18 of the Code of Civil Procedure. [*Para.* 5.]

Cases referred to:

Thiagarajan v. *Sundaravelu*, (1972) 1 M.L.J. 230: 85 L.W. 95: A.I.R. 1972 Mad. 216; *Sudarsman Dass* v. *Ramkripal Das*, A.I.R. 1967 Pat. 131;

*Appeal No. 434 of 1974. *6th December*, 1977.

Basavayya v. *Guruvayya*, (1951) 2 M.L.J. 176: 64 L.W. 669: I.L.R. (1952) Mad. 173: A.I.R. 1951 Mad. 938; *Kasi* v. *Ramanathan Chettiar*, (1947) 2 M.L.J. 523: (1947) M.W.N. 732; *Ghulusam Bibi* v. *Ahamadsa Rowther*, (1919) I.L.R. 42 Mad. 296: A.I.R. 1919 Mad. 998; *Mahalakshmamma* v. *Rajamma*, (1918) 43 I.C. 458: A.I.R. 1919 Mad. 868 (1); *Subbanna* v. *Subbanna*, (1966) 1 M.L.J. (S.C.) 67: (1966) 1 An. W.R. (S.C.) 67: (1966) 1 S.C.J. 269: (1965) 2 S.C.R. 661: A.I.R. 1965 S.C. 1325; *Venkata* v. *Lakshmi*, (1967) An.L.T. 104: A.I.R. 1967 A.P. 64; *Palanivel Pillai* v. *Sivakolundhu Odayar*, (1977) 2 M.L.J. 65.

Appeal against the decree of the Court of the Subordinate Judge, Udumalpet, dated 28th February, 1973, and passed in I.A. No. 66 of 1973 in O.S. No. 409 of 1948.

S. Nainar Sundaram, V. Natarajan and *V. Nicholas* for Appellant.

M.R. Narayanaswamy and *S. Jayaraman*, for Respondent.

The Court delivered the following

JUDGMENT.—The second defendant in O.S. No. 409 of 1948 on the file of the Court of the Subordinate Judge of Udamalpet is the appellant herein. The plaintiffs filed the suit for partition in the year 1948 and for possession of their 2/3rd share in one half of the suit property and for mesne profits. A preliminary decree was passed on 25th January, 1950. As against that, there was an appeal in A.S. No. 426 of 1950 to this Court, and by judgment dated 27th October, 1954, the plaintiffs were given mesne profits from 14th December, 1948, till date of delivery of possession of the property. On 11th February, 1957, the plaintiffs applied for passing of the final decree. A commissioner was appointed who made three reports on 27th October, 1958, 12th November, 1958 and 17th December, 1958. After the receipt of these reports, there was an interim final decree on 14th February, 1959. As against that interim final decree, there was an appeal which was dismised. On 28th February, 1973, there was a final decree directing mesne profits being paid at the rate of Rs. 500 per annum from 14th December, 1958, till date of delivery of possession. It is this direction that is now objected to.

2. The learned counsel for the appellant contended that though there may be more than one preliminary decree in a suit for partition, there could be only one final decree and that the Code of Civil Procedure does not envisage passing of piecemeal final decrees. In support of this submission he relied on a decision of this Court in *Thyagarajan* v. *Sundaravelu*.[1] In that case, a final decree had already been passed on 31st July, 1967, before the enquiry into the mesne profits was completed. There was no interim final decree as here. The order completing the enquiry into mesne profits was passed on 30th April, 1970. It was contended that more than one final decree could be passed in a partition suit. It was argued that if a partition suit comprised various items, more than one final decree could be passed; but in respect of each item, there could be only one final decree and not more than one, and that final decree should be final and complete with regard to that item. It was also pointed out that the mesne profits accruing from the said property formed part and parcel of the corpus and that there could not be a piecemeal final decree in respect of the same item or property, one relating to the corpus and the other relating to mesne profits. I am unable to agree that this decision has any application to the facts of this case. That was a case where a final decree had already been passed on 31st July, 1967. When once the suit was completely decided by the Court, the Court had no jurisdiction to pass any further order regarding the mesne profits. Therefore this decision had to be understood only in the light of the peculiar facts, namely, that the suit itself had been finally decided by the Court and that it therefore erroneously assumed jurisdiction to go into the mense profiits. It could not do so.

3. Another decision to which my attention was drawn is that of the Patna High Court in *Sudarsman Dass* v. *Ramkripal Das*.[2] In that case for partition, in the plaint the plaintiff claimed a decree for mesne profits past *pendente lite* and future profits. By the judgment of the trial Court, the suit was dismissed. The trial Court held that the plaintiff was not entitled to any share and in that view, there was no question of any mesne profits. That judgment was set aside ultimately by the Judicial Committee of the Privy Council in November, 1949. The preliminary decree had therefore to be in accordance with the judgment of the Judicial Committee. However, there was no mention in that decree about the plaintiff's claim to mesne profits. On these facts, it was pointed out that during

1. (1972) 1 M.L.J. 230: 85 L.W. 95: A.I.R. 1972 Mad. 216.

2. A.I.R. 1967 Pat. 131.

the proceedings for passing the final decree, mesne profits should have been enquired into at least with regard to past *pendente lite* and that neither the plaintiff took any step in that direction nor did the Court do anything in that respect. When the final decree was passed without any reference to mesne profits or even any direction to mesne profits to be determined later on, the plaintiff could have appealed against that final decree, but he did not do so. It is in the light of these facts that the Patna Hight Court held that there could not be any enquiry into mesne profits. Here also it could be seen that the Court had rightly or wrongly disposed of the matter without any reference to mesne profits and it is thereafter that the question regarding mesne profits was agitated. It was held that the Court did not have any jurisdiction to do so. This case also has to be understood in the light of the fact that the matter has already been disposed of by the Court and it wanted to consider the question of mesne profits after finally passing a final decree. In the present, case the decree dated 14th February, 1959 was itself in the nature of an interim final decree. *Ex facie* it stated that it was not a final decree disposing of the suit *in toto*. Against that decree, there was an appeal and that appeal was dismissed. Therefore what was subsequently passed is only a continuation of the said final decree proceedings and it is now that the suit must get terminated. In these circumstances, I do not find any infirmity in the order of the Court below in giving the direction regarding the sum of Rs. 500 as mesne profits.

4. The learned counsel for the appellant next contended that even assuming that the Court had jurisdiction to pass a decree in respect of mesne profits at this stage, still it could do so only for a period of three years from the preliminary decree and not beyond that date. For this purpose, reliance was placed on Order 20, rule 12 of the Code of Civil Procedure. It provides that where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree directing an inquiry as to rent or mesne profits from the institution of the suit until (*i*) the delivery of possession to the decreeholder, (*ii*) the relinquishment of possession by the judgment-debtor with notice to the decreeholder through the Court, or (*iii*) the expiration of three years from the date of the decree whichever event first occurs. (Vide Order 20, rule 12. clause (*c*), Civil Procedure Code, The question whether Order 20, rule 12 is applicable to a suit for partition has been the subject-matter of a decision by a Full Bench of this Court in *Basavayya* v. *Guruvayya*[1], in which there is a reference to an earlier decision of a Bench of this Court in *Kasi* v. *Ramanathan Chettiar*.[2] The Full Bench observed as follows:—"Ordinarily there will be one preliminary and one final decree, but as pointed out in *Kasi* v. *Ramanathan Chettiar*[2], there is nothing in the Civil Procedure Code which can be construed as a prohibition against the Court, in proper case, passing more than one preliminary decree and one final executable decree in a suit. The relevant provisions of the Code and the earlier rulings of this and the other High Courts are reviewed in the judgment of Patanjali Sastri, J. with which we are in respectful agreement. A judicial determination of the amount of future profits has to be made with reference to any one of the three events specified in Order 20, rule 12, sub-rule (1) (*c*), whichever event first occurs. If a preliminary decree awarding possession contains a direction for enquiring into future mesne profits the suit or that part of the suit relating to future mesne profits continues to be pending and the decreeholder might move the Court to hold an enquiry and pass a final decree awarding such profits without the necessity of filing an application within the period prescribed by Article 181 of the Limitation Act." Later in the same decision at page 179, it was observed as follows:—

> "We have dealt at some length on the scope and effect of Order 20, rule 12, Civil Procedure Code, in view of the strong reliance placed on its terms by the learned Judges in *Ghulusam Bibi* v. *Ahamadsa Rowther*[3] which however like the present case, was a suit for partition. We have already stated that Order 20, rule 12 relates to "mesne profits" in the sense in which that expression is defined in section 2, clause (12) of the Civil Procedure Code. The claim of a plaintiff suing for partition and his share of the profits accruing from the lands pending the suit is not, properly speaking, a claim for "Mesne Profits" and Order 20,

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1. (1951) 2 M.L.J. 176 at 178: 64 L.W. 669: I.L.R. (1952) Mad. 173: A.I.R. 1951 Mad. 938.

2. (1947) M.W.N. 732: (1947) 2 M.L.J. 523.

3. (1919) I.L.R. 42 Mad. 296: A.I.R. 1919 Mad. 998.

rule 12, Civil Procedure Code, has no application to such a case. Order 20, rule 18 (2), Civil Procedure Code provides that if a partition of immoveable property cannot be conveniently made without further enquiry, the Court may pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. In our opinion, this rule does not mean that all directions which may be necessary or proper to be given in a partition suit before a final decree is passed should be given at the stage of the preliminary decree itself. It may be necessary in a partition suit not merely to divide the properties, but also to realise outstandings, discharge common liabilities, sell properties not capable of easy division, direct different sharers to account for different periods of time in respect of profits of different properties, adjust the equities between the parties and give directions from time to time to the commissioners appointed to divide the properties or take accounts. It is not reasonable to suppose that the power of the Court to give directions in respect of all or any of these matters must be exercised only at the time of passing the preliminary decree and is exhausted with the passing of that decree. If Order 20, rule 12 or the analogy of that rule is to be applied to suits for partition, as was done in *Ghulusam Bibi* v. *Ahamadsa Rowther*.[1] a direction for an enquiry into profits past or future, can be given only at the time when a decree for possession of the property is, passed, that is to say, at the time of the passing of a final decree for partition of the properties when alone the sharers would be entitled to get possession of their respective allotments. On the completion of such enquiry, a further final decree in respect of profits will have to be passed This was the view taken by Oldfield, J., in *Mahalakshmamma* v. *Rajamma*,[2] I might mention that the conclusion of the learned Judge was affirmed in L.P.A. Nos. 116 and 58 of 1917".

5. The above Full Bench decision itself envisages more than one direction being given at different stages of the proceedings in the passing of the final decree. There can thus be directions from time to time. It also shows that the provisions of Order 20, rule 12 did not apply to a partition suit and that the proper provision to be applied is Order 20, rule 18. In fact, Order 20, rule 18, C.P. Code., opens with these words, namely, "where the Court passes a decree for the partition of property or for the separate possession of a share therein" This is a special provision made for suits for partition and order 20, rule 12, C P. Code applies to a suit for the recovery of possession of an immovable property and for rent and mesne profits. The two provisions are designed to meet different situations. Therefore, the restriction contained in Order 20, rule 12, sub-rule 1 (*c*) will not apply to partition suits. which are governed by Order 20, rule 18 of the Code of Civil Procedure.

6. Learned counsel for the appellant invited my attention to the decision of the Supreme Court in *Subbanna* v. *Subbanna*.[1] That case dealt with the provisions of Order 20, rule 12 of the Code of Civil Procedure which as already held by the Full Bench of this Court is not applicable to a case of this nature. The decision of the Andhra Pradesh High Court in *Venkata* v. *Lakshmi*[2] is on a suit between a principal and an agent to which the provisions of Order 20, rule 18 have no application. It is therefore unnecessary to consider that decision any further. The only other decision cited by the learned counsel for the appellant is that in *Palanivel Pillai* v. *Sivakolundhu Odayar*[3] That was also a suit for partition. At page 68 it was observed that it was well-settled that there could be more than one preliminary decree and more than one final decree. However, restrictions contained in Order 20, rule 12 were considered to be applicable even to a suit for partition and the decision of the Full Bench cited supra appears to have been not noticed in that decision. As there is a Full Bench decision laying down that Order 20 rule 12, C.P. Code is not applicable to suits for partition, the decision in *Palanivel Pillai* v. *Sivakolundu Odayar*[3] does not appear to be good law There is no merit in the appeal and it is accordingly dismissed. There will be no order as to costs in this appeal.

S.J. —— *Appeal dismissed.*

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1. (1919) I.L.R 42 Mad. 296: A.I R. 1919 Mad. 998.
2. (1918) 43 I.C. 458: A.I.R. 1919 Mad. 868 (1).

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1. (1966) 1 M.L.J (S.C) 67: (1966) 1 An W.R. (S.C) 67: (1966) 1 S.C.J 269: (1965) 2 S.C.R. 661: A.I.R. 1965 S.C. 1325.
2. (1967) 1 An L.T. 104: A.I.R. 1967 A.P. 64.
3. (1977) 2 M L J 65.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N.S. Ramaswami, J.*

Rajanarayanaperumal Temple, Melaiyur, Sirkali taluk, by its Executive Officer .. *Appellant**

v.

Rethinam Pillai. .. *Respondent.*

(*A*) *Tamil Nadu Hindu Religious and Charitable Endowments Act* (*XXII of* 1959), *section* 109—*Transfer of property belonging to temple by former trustee—Suit for recovery of possession with future profits—Limitation—Suit held not barred by virtue of section* 109.

(*B*) *Madras Minor Inams* (*Abolition and Conversion into Ryotwari Act* (*XXX of* 1963), *section* 41—*Scope.*

M, who was a trustee of a temple purported to exchange the suit property belonging to the temple with another property belonging to one *B* in 1941 under the original of Exhibit A-4, dated 2nd December, 1941. Subsequently, within two days thereafter, under the original of Exhibit A-5, dated 4th December, 1941, the suit property was purchased in the name of *B*, the wife of *M*. *M* died in the year 1942. The members of *M's* family continued to be trustees of the temple till 1967. In that year different trustees were appointed. The temple represented by the trustee and executive officer filed the suit for recovery of possession with future profits of the temple land that was exchanged by *M*. Pending suit *B* died. *R* who was the adopted son of *M* was brought on record. The Courts below concurrently held that the suit was barred by limitation and that the defendants acquired title by adverse possession. The trial Court also held that the provisions of Act XXX of 1963 were a bar to the maintainability of the suit and that the plaintiff could not sue for possession without seeking to set aside or cancel the exchange deed, the original of Exhibit A-4. On second appeal,

Held: It was clear that section 109 of Act XXII of 1959 providing that nothing contained in any law of limitation for the time being in force shall be deemed to vest in any person the property or funds of any religious institution which had not vested in such person or his predecessor in title before the 30th September, 1951 was a special provision regarding the law of limitation and that would prevail over the general provisions contained in the Limitation Act. By 30th September, 1951 (specified in section 109 of Act XXII of 1959), twelve years had not elapsed after *M's* death. Therefore undoubtedly by 30th September, 1951 the property had not vested in the defendant. That meant in spite of the provisions in the Limitation Act the plaintiff was entitled to recover possession. [*Para.* 12.]

Question of title was purely within the jurisdiction of the Civil Court and not within the jurisdiction of the Tribunal or Special Appellate Tribunal (under Act XXX of 1963). Therefore any decision rendered by the Civil Court (not being the Court of the District Munsif or the Court of Small Causes) regarding title would conclude the issue when the parties went before the Tribunal or the Special Appellate Tribunal. [*Para.* 16.]

The suit was decreed for possession with future mesne profits. [*Para.* 21.]

Cases referred to —

Chinna Jeeyangar Mutt, Tirupathi v. *C.V. Purushotham*, (1973) 2 An. W.R. 302: A.I.R. 1974 A.P. 175; *C.V. Purushotham* v. *Chinna Jeeyangar Muth, Tirupathi*, (1975) 2 An. W. R. 114: (1975) An. L.T. 102: (1975) 1 A.P.L.J. 142: A.I.R. 1975 A.P. 153; *State Wakf Board* v. *Subramanyam*, (1976) 2 M.L.J. 263: I.L.R. (1976) 2 Mad. 79: 89 L.W. 467: A.I.R. 1977 Mad. 79; *Nair Service Society* v. *K.C Alexander*, (1969)1 S.C.J. 455: (1968) 3 S.C.R. 163: A.I.R. 1968 S.C 1165; *Ambika Prosad* v. *Ram Ekbal Rai*, (1966) 1 S.C.R. 758: A.I.R. 1966 S.C. 605; *Gurbindar Singh* v. *Lal Singh*, A.I.R. 1965 S.C 1563: (1966) 2 M.L.J. (S.C.) 8: (1965) 3 S.C.R 63; (1966) 2 S.C.J. 157: (1966) 2 An. W.R. (S.C.) 8: *Kanappu Mudaliar* v. *Munuswami Mudaliar*, (1971) 84 L.W. 355: A.I.R. 1970 Mad. 328; *Southern India Education Trust by C.A. Mohamed Ibrahim* v. *M.S. Jagadambal*, (1972) 1 M.L.J. 379: (1971) 84 L.W. 815: A.I.R. 1972 Mad 162; *Soosai Udayar* v. *Andiyappan*, (1959) 1 M.L.J. 195; *Adakalathammal* v. *Chinnayan Panipondar*. (1959) 1 M.L.J. 314: A.I.R. 1959 Mad. 447; *Krishnaswami Thevar* v. *Perumal Konar*, (1959) 1 M.L.J. 168; *Md. Mustafa Marakayar* v. *Udayamachiammal*, (1968) 2 M.L.J. 58: *State of Madras* v. *Balamannonda Reddiar*, (1972) 85 L.W. 141: A.I.R. 1973 Mad. 14; *Lakshminarayana Ayyar* v. *Nallachi Ammal*, (1974) 1M.L.J. 424; *Rajasekaran* v. *Elumalai Coundar*, (1976) 1 M.L.J. 288; *Poosari Mahalingam and others* v. *Muthuswami Thevar and others*, 1974 T.N.L.J. 162; *Sornathammal* v. *Ramachandran*, 1975 T.N.L.J. 151; *Jumma Mosque. Salvakkam* v. *Sulaiman Sheriff*, (1978) 2 M.L.J. 99: 1977 T.N.L.J. 151.

* S.A. No. 2386 of 1976. *14th October*, 1977

Appeal against the decree of the District Judge, East Thanjavur at Nagapattinam in Appeal Suit No. 174 of 1975 preferred against the decree of the Court of the District Munsif of Sirkali in Original Suit No. 671 of 1959.

E. Padmanabhan, for Appellant.

V. Ratnam, for Respondent.

The Court delivered the following

JUDGMENT.—The main question in this Second Appeal filed by the plaintiff is whether the plaintiff's title had been extinguished by the law of limitation. The plaintiff is the Sri Rajanarayanaperumal Temple, Melayur represented by its trustee and Executive Officer. The suit is for recovery of possession with future profits of an agricultural land whose extent is 96 cents comprised in R. S. No. 169/6, Melayur, Sirkali taluk. It is not in dispute that the suit property belonged to the temple, the same having been granted as an *iruwaram* inam.

2. One Manikkam Pillai was formerly the trustee of the temple. In the year 1941, he purported to exchange the suit property with another property of one Muthiah Pillai. The other property is said to be comprised in two survey numbers whose total extent is 92 cents. The exchange was under the original of Exhibit A-4, dated 2nd December, 1941. Within two days thereafter, that is under the original of Exhibit A-5 dated 4th December, 1941, the suit property was purchased in the name of the first defendant to the suit, who is no other than the wife of the said Manikkam Pillai (the then trustee). In effect, the trustee (Manikkam Pillai) got the suit property which is admittedly that of the temple transferred to his wife's name in a circuitous way, that is by transferring it to Muthiah Pillai in exchange for another property and getting a sale deed from Muthiah Pillai in the name of the wife (first defendant). It is common ground that Manikkam Pillai died in the year 1942; and the members of his family continued to be trustees of the temple till 1967. Only in that year, the present trustees were appointed. Later an Executive Officer was also appointed for the temple.

3. The case of the plaintiff has been that the alienation by the then trustee Manikkam Pillai is void and that the plaintiff is entitled to recover possession with mesne profits. Bakkiathachi, the widow of Manikkam Pillai was the sole defendant originally impleaded in the suit. She died pending suit and Rethinam Pillai, the adopted son of Manikkam Pillai has been impleaded as the second defendant. He contested the suit mainly on the ground of limitation. He also contended that by virtue of the Madras Inams (Abolition and Conversion into Ryotwari) Act, XXX of 1963, the plaintiff's right, if any, should be held to be barred. The Courts below have concurrently found that the suit is barred by limitation and that the defendants must be held to have acquired title by adverse possession. The trial Court has also held that the provisions of Act XXX of 1963 are a bar for the maintainability of the suit and further the plaintiff cannot sue for possession without seeking to set aside or cancel the exchange deed, the original of Exhibit A-4.

4. In this Second Appeal by the plaintiff it is not seriously disputed by the respondent that the alienation under the original of Exhibit A-4 made by Manikkam Pillai is void. When the alienation was made, the Madras Hindu Religious Endowments Act, II of 1927 was applicable. Under section 44-B of the said Act (which corresponds to section 41 of Act XXII of 1959), any exchange, gift, sale or mortgage and any lease for a term exceeding five years of the whole or any portion of any inam granted for the support or maintenance of a temple etc., shall be null and void. Therefore the alienation under the exchange deed is clearly void and there is no need for the plaintiff to ask for cancellation or setting aside the said document before seeking to recover possession of the property. This position is not disputed by Mr. V. Ratnam, learned counsel for the respondent.

5. As I said the question is whether the suit is barred by limitation. Two contentions were raised on behalf of the plaintiff-appellant in this regard. The first is that by virtue of Article 96 of the Limitation Act of 1963, the suit is within time. The second is based on section 109 of the Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959). I am of the view that but for section 109 of Act XXII of 1959, the suit cannot be saved from the bar of limitation and the interpretation sought to be made by the learned counsel for the plaintiff on Article 96 of the Limitation Act of 1963 is not acceptable.

6. Article 96 corresponds to Article 134-B of the Limitation Act of 1908. The difference between these Articles is that while under the earlier one, time begins to run from the date of death, resignation or removal of the transferor under the Article in the new Act, the third column is:

"The date of death, resignation or removal of the transferor or the date of appointment

of the plaintiff as manager of the endowment, whichever is later."

The starting point of limitation from the date of appointment of the plaintiff as manager has been newly introduced under the Act of 1963 and the Article makes it clear that a suit for recovery of possession can be filed within twelve years either from the date of the death or removal of the transferor or the date of appointment of the plaintiff as manager whichever is later. The contention of Mr. E.Padmanabhan, learned counsel for the plaintiff was that the trustees for the temple having been appointed only in the year 1967 and the suit having been instituted in 1969 itself, the suit is not barred.

7. But this contention overlooks one important aspect, namely that the new Article would have no application if the title of the temple had been extinguished even prior to the coming into force of the Limitation Act of 1963. In the present case, as already seen, the alienation was in the year 1941 and the alienating trustee died in the year 1942. As the law then stood, Arti le 134-B of the Act of 1908 would apply, which means that a suit for recovery of possession ought to be filed within 12 years of the death of Manikkam Pillai. Before the coming into force of the Limitation Act of 1963, more than 12 years have elapsed after the death of the transferor. That means by virtue of section 28 of the old Act, the temple's right to the suit property shall be deemed to have been extinguished, unless section 109 of Act XXII of 1959 comes to its rescue.

8. There can be no doubt that if the present suit had been filed prior to the coming into force of the Limitation Act of 1963, it must be necessarily held that the suit is barred under Article 134-B of the old Act and the plaintiff would have been non-suited unless the suit is saved by section 109 of Act XXII of 1959. There is nothing in the new Limitation Act to revive a right which had been extinguished even prior to the coming into force of the said Act. On the contrary, section 31 (a) of the new Act says that nothing in the Act shall enable any suit, appeal or application to be instituted, preferred or made, for which the period of limitation prescribed by the Indian Limitation Act, 1908 expired before the commencement of this Act.

9. In *Chinna Jeeyangar Mutt, Tirupathi* v *C.V. Puruthotham*[1] a single Judge of the Andhra Pradesh High Court was of the view that in spite of section 31 of the new Limitation Act, Article 96 of the new Act would be applicable even in a case where the alienating trustee had i ed more than 12 years prior to the coming into force of the new Limitation Act. But this decision of the single Judge has been overruled by a Division Bench of the Andhra Pradesh High Court in *C. V. Purushotham* v. *Chinna Jeeyangar Mutt, Tirupathi.*[1] In second Appeal No. 400 of 1972, (*Sornathammal and others* v. *Tamil Nadu State Wakf Board*, by judgment dated 11th July 1975, Natarajan, J., held that the suit for recovery of the properties alienated in the years 1953 and 1955 by the prior muthavalli was not barred because it had been filed within twelve years from the date of the constitution of the Wakf Board. Second Appeal 456 of 1972, (*Thangiah Velar and another* v. *Tamil Nadu State Wakf Board* decided by the same learned Judge by judgment dated 29th July 1975 is also a similar case In the latter of the two cases, the learned Judges has referred to the decision in *Chinna Jeeyangar Mutt, Tirupathi* v. *C.V. Purushotam*[2] with approval. Unfortunately the fact that that decision had been reversed in *C V. Purushotham* v. *Chinna Jeeyangar Mutt, Tirupathi*[3] had not been brought to the notice of the learned Judge. However, in neither of these two judgments, it has been held by the learned Judge, that even if the right to recover property had been extinguished by operation of the law of limitation as it then stood (prior to the coming into force of the Limitation Act of 1963), a suit can be maintained after the coming into force of the later Act In fact, in Second Appeal No 456 of 1972, the facts are that the alienating muthavalli was alive even on the date of suit and there is nothing to show that he had either resigned or had been removed more than 12 years prior to the institution of the suit. Therefore, there was no question of the right having been extinguished even prior to the coming into force of the new Limitation Act. In Second Appeal No. 400 of 1972 the facts are not clear as to the date of death or resignation or removal of the alienating muthavalli.

10. In *State Wakf Board* v. *Subramanyam*[4], Ismail, J., had to consider the question whether the suit was within time under Article 96 of the new Limitation Act That was also not a case where the right had been extinguished prior to the coming into force of the new Limitation Act, for the alienating trustee

1. (1973) 2 An. W.R. 302: A I.R. 1974 A.P. 175.

1. (1975) 1 A P L J. 142: (1975) An L.T. 102: (1975) 2 An. W.R. 114: A.I.R. 1975 A.P 153.
2. (1973) 2 An. W R. 302: A. I. R. 1974 A.P. 175.
3. A.I.R. 1975 A.P. 153.
4. (1976) 2 M.L.J. 263: I.L.R. (1976) 2 Mad. 79: 89 L.W. 467: A.I.R. 1977 Mad. 79.

had died only in the year 1953, and twelve years had not passed before the New Act came into force.

11. In my judgment (*Damodaran Chetty* v. *Govindasami Chetty and others*)[1] I had to consider the question as to whether a suit which had become barred under Article 142 of the old Limitation Act can be maintained under Article 65 of the new Limitation Act. I have held that if the suit had been barred under Article 142 of the old Act, the right of the plaintiff to recover the immovable property had become extinguished even prior to the coming into force of the new Act and there is nothing in the new Act to revive the right. In that judgment I have explained the observations of the Supreme Court in *Nair Service Society* v. *K. C. Alexander*,[2] and also referred to *Ambika Prasad* v *Ram Ekbal Rai*,[3] and *Gurbindar Singh* v. *Lal Singh*.[4] A different view has been taken by Alagiriswami, J., as he then was, in *Konnappa Mudaliar* v. *Munuswami Mudaliar*[5], but that decision has since been overruled by a Division Bench of this Court in *Southern India Education Trust by C. A. Mohamed Ibrahim* v *M. S. Jagadambal*[6]. What applies to Article 142 read with section 28 of the old Act would also apply to Article 134-B read with the above said section.

12. Therefore unless the second line of argument, namely that based on section 109 of Act XXII of 1959 is acceptable, the suit must be held to be barred by limitation But I am of the view that the learned counsel for the plaintiff-appellant is on firm ground in respect of his contention based on section 109 of Act XXII of 1959. That section is in the following terms:

> "Nothing contained in any law of limitation for the time being in force shall be deemed to vest in any person the property or funds of any religious institution which had not vested in such person or his predecessor-in-title before the 30th September, 1951".

1. C S Nos. 109 of 1964 and 2 of 1969, dated 13th July 1971.
2. (1969) 1 S.C.J. 455: (1968) 3 S.C.R. 163: A.I.R. 1968 S.C. 1165
3. (1966) 1 S.C.R. 758· A.I.R. 1966 S.C. 605.
4. (1966) 2 M.L.J. S.C. 8· (1966) 2 S.C J. 157: (1966 2 An. W.R. (S.C.) 8: (1965) 3 S.C.R. 63: A.I.R. 1965 S.C. 1553.
5. (1971) 84 L.W. 355: A.I.R. 1970 Mad. 328.
6. (1971) 84 L.W. 815: (1972) 1 M.L.J. 379: A.I.R. 1972 Mad. 162.

It is clear that this is a special provision regarding the law of limitation and that would prevail over the general provisions contained in the Limitation Act Unless the plaintiff's title had been extinguished prior to 30th September, 1951, then undoubtedly it is entitled to recover the property by virtue of this section. Natesan, J., in his judgment, (*Govindaswami* v. *Mottayan Chettiar and another*,[1] had to consider the above section. The learned Judge has held that unless the defendant had prescribed title to the property by 30th September, 1951, the property cannot be said to have vested in him by the sale and therefore there was no question of the deity's title being lost by the law of limitation. In the present case, as already seen, Manikkam Pillai the alienating trustee died in the year 1942. It is not anybody's case that he had either resigned or that he had been removed prior to his death. By 30th September, 1951, twelve years had not elapsed after Manikkam Pillai's death. Therefore undoubtedly by 30th September, 1951 the property had not vested in the defendant. That means in spite of the provisions in the Limitation Act, the plaintiff is entitled to recover possession.

13. Mr. V. Rathnam, learned counsel for the respondent contends that the property is a minor inam, that Act XXX of 1963 applies and by virtue of the various provisions contained in that Act and the fact that the settlement authorities have issued a patta to the defendant it must be held that the plaintiff has no title. It is admitted that originally patta was granted by the Settlement Officer to the plaintiff by order dated 30th September, 1964. But subsequently, that is on 12th November, 1976, the Tribunal has reversed the order of the Settlement Officer and granted patta to the respondent. This is said to be on the basis of the judgment of the Court below in this very suit and also because the respondent is in possession. However, the plaintiff-temple has filed a Special Tribunal Appeal to this Court and the same is said to be pending.

14. The contention of Mr. Rathnam is that by virtue of Act XXX of 1963 the property vested in the Government and as patta has been issued to the respondent, the plaintiff-temple has no longer any right. But this is not tenable. The provision regarding vesting under Act XXX of 1963 is similar to those in Act XXVI of 1948. The provisions relating to

1. S. A. No. 1220 of 1966, dated 15th November, 1968.

grant of ryotwari patta are also similar in both the Acts. It is settled law that the question of title has always to be decided by the civil Court and the provisions of Act XXVI of 1948 do not in any way take away the civil Court's jurisdiction to decide such a question.—See *Sossai Udayar* v. *Andiyappan*[1]; *Adakalathammal* v. *Chinnayan Panipundar*[2]; *Krishnaswami Thevar* v. *Perumal Konar*[3]; *Md. Mustafa Marakayar* v. *Udayanachiammal*[4]; *State of Madras* v. *Balamanavala Reddiar*[5]; *Lakshminarayana Ayyar* v. *Nallachi Ammal*[6]; and *Rajasekaran* v. *Elumalai Gounder*[7].

15. The law is not different under Act XXX of 1963-*see* Judgment of Gokulakrishnan, J. *Poosari Mahalingam Pandaram and others* v. *Muthuswamy Thevar and others*[8], judgment of Mohan, J., *Sornathammal* v *Ramachandran and others*[9] and the judgment of Sethuraman, J., in *Jumma Mosque, Salavakkam* v. *Sulaiman Sheriff and another*[10]. In the last of the cases, Sethuraman, J, has pointed out that the jurisdiction of the Assistant Settlement Officer is merely for the purpose of granting a patta and not to decide any dispute as to title. His jurisdiction as well as that of the Tribunal is restricted to the question of issue of ryotwari patta. The learned Judge held that neither the Settlement Officer nor the Tribunal has jurisdiction to go into the question of title to the land as such.

16. Section 43 of Act XXX of 1963 speaks about *res judicata*. I will extract the said section:

"(1) The decision of a Tribunal or the Special Appellate Tribunal in any proceedings under this Act on any matter falling within its jurisdiction shall be binding on the parties thereto and persons claiming under them, in any suit or proceeding in a Civil Court, in so far as such matter is in issue between the parties or persons aforesaid in such suit or proceeding.

(2) The decision of a Civil Court (not being the Court of a District Munsif or a Court of Small Causes) on any matter falling within its jurisdiction shall be binding on the parties thereto and persons claiming under them in any proceeding under this Act before a Tribunal or the Special Appellate Tribunal in so far as such matter is in issue between the parties or persons aforesaid in such proceeding."

As it is clear from the provisions of the Act that the question of title is beyond the jurisdiction of the Tribunal or the Special Appellate Tribunal, any decision by them would not attract the bar under section 43 (1) regarding such question. In fact sub-section (2) quoted above puts the matter beyond any controversy. That provision makes it clear that regarding matters which are within the jurisdiction of the civil Court, a decision of that Court would be final and would be binding on the parties when they go before the Tribunal or the Special Appellate Tribunal. Question of title is purely within the jurisdiction of the civil Court and not within the jurisdiction of the Tribunal or Special Appellate Tribunal. Therefore any decision rendered by the civil Court (not being the Court of the District Munsif or the Court of Small Causes) regarding title would conclude the issue even when the parties go before the Tribunal or the Special Appellate Tribunal.

17. Here the original title of the temple is not in dispute. The only question is whether its title had been extinguished by the law of limitation. The authorities who granted patta are certainly not called upon to decide such a question.

18. There is nothing in the judgment *Mohamed Abubacker* v. *R. Renganathan Chettiar and others*[1] against the above position. There is one observation which is liable to be misunderstood. It is stated that the question of title will have to follow a decision under the provisions of the Act (Act XXX of 1963) to grant patta. From this it is certainly not meant that if a party obtains patta before the Tribunal or the Special Appellate Tribunal, as the case may be, he should succeed in the civil Court on the question of title also. The Division Bench has

1. (1959) 1 M.L.J. 195.
2. (1959) 1 M.L.J. 314: A.I.R. 1959 Mad. 447.
3. (1961) 1 M.L.J. 168.
4. (1968) 2 M.L.J. 58.
5. 85 L.W. 141: A.I.R. 1973 Mad. 14.
6. (1974) 1 M.L J. 424.
7. (1976) 1 M.L.J. 288.
8. (1974) T.N L.J. 162.
9. (1975) T.N.L.J. 151.
10. (1977) T.N.L.J 151.

1. L.P. A. No. 18 of 1968, dated 24th June, 1969.

made it clear that "which of the competent claimants to title is entitled to succeed will be a matter to be finally settled by a civil Court." The earlier reference that question of title will have to follow a decision under the provisions of the Act (Act XXX of 1963) to grant patta had obviously been made because in that case it was thought that the civil Court may decide the question of title after the patta proceedings were over. However, even for postponing a decision regarding the question of title by the civil Court (till patta proceedings are over), there is no provision in the Act and the Bench which decided the Letters Patent Appeal has not referred to any provision nor has it given any reason. Hence the decision in the Letters Patent Appeal, for postponing a decision by the Civil Court, regarding title, should be held to be confined to the facts of that case.

19. Mr. Rathnam referred to section 8 (2) of Act XXX of 1963 which says that notwithstanding anything contained in Act XXII of 1959, the provisions in that section shall apply in the case of lands in an *irsvaram* minor inam granted for the support or maintenance of a religious institution and contended that by virtue of this provision, the plaintiff cannot invoke section 109 of Act XXII of 1959. This is not tenable. Section 8 relates to grant of ryotwari patta and sub-section (2) thereof specifies certain categories of persons who should be granted patta and that provision is made a *non-obstante* clause, the effect of which is that whatever be the provisions in Act XXII of 1959, the categories of persons mentioned in section 8 (2) of Act XXX of 1963 are entitled to patta. But it must be remembered that the question of title is different from the obtaining of patta and the provision relied on has nothing to do with the operation of section 109 of Act XXII of 1959 which is only a special provision relating to limitation. Therefore if the plaintiff's suit is not barred by virtue of section 109 of Act XXII of 1959, there is no use of the plaintiff invoking section 8 (2) which only relates to patta proceedings.

20. The plaintiff temple is not claiming any title to the 92 cents of land in R.S. Nos. 168/2 and 170/5 covered by the exchange deed, the original of Exhibit A-4. As the title to the suit property, namely R.S. No. 169/6, had not passed from the plaintiff-temple, the plaintiff did not get title to the alternative property, namely R.S. Nos. 168/2 and 170/5. The learned counsel for the plaintiff-temple concedes that the temple does not claim any title to the 92 cents land covered by the said deed of exchange. As already noticed even after Manikkam Pillai's death, his family members were functioning as the trustees of the plaintiff-temple till 1967. Therefore the said 92 cents of land had been with them and even after the new trustees were appointed in 1967 it continues to be with them. It is made clear that the plaintiff-temple has no title to the said 92 cents and the same should belong to the second defendant.

21 In the result the second appeal is allowed. The decrees and judgments of the Courts below are set aside and the suit is decreed for possession with future mesne profits which are to be determined on an application under Order 20, rule 12, Code of Civil Procedure. The plaintiff would have its costs throughout.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

N.A. Perianna Chettiar (died) and others .. *Appellant**

v.

Seora Radhakrishna Chetti and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 69 —*Suit on mortgage to recover balance of amount due—Sale of hypotheca by mortgagors—Purchase thereof by defendant on behalf of joint family - Suit on mortgage by original mortgagee alone—Original mortgagee dying as undivided member—Family arrangement allotting some properties to the members of the family—No decision on outstandings including the mortgage, in question—Suit on the mortgage whether maintainable by one member.*

Contract Act (IX of 1872). *sections* 59 *and* 60—*Appropriation in the case of single debt by agreement only and not by unilateral choice of debtor—General principle to appropriate first for interest and then towards principal applicable.*

Hindu Law—Partial Partition, if permissible.

Civil Procedure Code (V. of 1908), *Order* 34, *rule* 1 —*Parties to suit relating to mortgage.*

Order 34, rule 1 of the Code of Civil Procedure provides that all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. [*Para.* 8.]

It is well-settled that a partition between co-parceners may be partial either in respect of the property or in respect of the persons making it, and it is open to the members of a joint family to make a division or severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest of the properties as a joint and undivided family. The whole of the joint family property is owned by the joint family, which can exercise its rights over any of those assets through its karta. It can alienate an item thereof without thereby affecting its status as joint family. Just as it can alienate it to a third person, so also it can alienate it to its own members. In other words, it can take it out of the class of oint family property and divide it among its members consequently, when a joint family divides among its members part of the joint family assets without intending to sever the family, there is no disruption of the joint status and it remains a joint family. The only effect is that the joint family property is reduced to that extent. [*Paras.* 10 & 12.]

Held, that there was no division between the first plaintiff and the other plaintiffs in regard to the outstandings due to the family and therefore, the first plaintiff could himself have maintained the suit for realisation of the mortgage. [*Para.* 14.]

The provisions contained in sections 59 to 61 of the Indian Contract Act applied only to a case where more than one amount of debt is due from one party to the other. Appropriation in the case of a single debt would be governed by agreement and not by the unilateral choice of the debtor. If there was no agreement the general rule of appropriation, first for interest and then towards principal would apply. [*Paras.* 18 & 22.]

Cases referred to:—

Mohammed Ismail Maracair and others v. *Doraisami Mudaliar and others*, (1959) 2 M.L.J. 74: 71 L.W 606: I.L.R. (1958) Mad 1066 A.I.R. 1958 Mad. 621: *Appovier* v. *Rama Subba Aiyar*, (1866) 11 M.I.A. 75; *K. Ramalingam and another* v. *Narayna Annavi and another*, 43 M.L.J. 428: 49 I.A. 168: (1922) I.L.R. 45 Mad. 489: A.I.R. 1922 P.C. 201: *Charandas Haridas* v. *Commissioner of Income-tax*, 1960 S.C.J 929: 39 I.T.R. 202: (1960) 3 S.C.R. 296: A.I.R. 1960 S.C. 910; *Jea Ram Sulakhan Mal*, A.I.R. 1941 Lah. 386 (F.B.); *Harkisondas Lakshmidas Pyarathi* v. *Nariman Dadabhoy Parsi*, A.I.R. 1927 Bom 479; *Parry's Banking Company* v. *Yates*, (1898) 2 Q.B.D 460; *Meka Venkatadri Appu Rao Bahadur Zamindar Garu and others* v. *Raja Parthasarathy Appa Rao Bahadur Zamindar Garu*, 40 M.L.J 549: 14 L.W. 25: I.L.R. 44 Mad. 570: (1921) 48 I.A. 150: A.I.R. 1922 P.C. 233· *Raj Bahadur Seth Nemichand* v. *Seth Radha Kishen*, A.I.R. 1922 P.C 26; *Appa Rao Bahadur Zamindar Garu* v. *Raja Parthasarathy Appa Rao Bahadur Garu*, (1922) 26 C.W.N. 23; *Meghraj and others* v. *Mst. Baybai and others*, (1970) 1 S.C.J. 27: (1970) 1 S.C.R 523: A.I.R. 1970 S.C. 161; *Cheey* v. *Box*, 22 E.R. 1197.

*A.P. No. 644 of 1973, *7th April*, 1978.

Appeal against the decree of the District Judge, Dharmapuri at Krishnagiri in Original Suit No. 77 of 1970.

T.R. Ramachandran, T R Rajagopalan, S.S. Mathivanan and *T.R. Rajaraman,* for Appellants.

S. Jagadeesan, for Repondents.

The Court delivered the following

JUDGMENT:—The plaintiffs in O.S.No. 77 of 1970 in the Court of the District Judge of Dharmapuri at Krishnagiri are the appellants. They filed a suit on a mortgage deed executed on 19th April, 1949 by one Govinda Chettiar whose sons are defendants 1 and 2 in the suit. The mortgage carried interest at the rate of 10 annas per cent per month. The mortgagors sold the hypotheca to the fourth defendant, who purchased the same on behalf of a joint family consisting of himself, his brother the fifth defendant and his father, the third defendant.

2. The original mortgagee was N.A. Subramania Chettiar. He died in or about 1962 as an undivided member of a joint family consisting of himself, his brother the first plaintiff and his children, plaintiffs 2 to 6. Originally the first plaintiff alone filed the suit. But later on, an objection being taken by defendants 3 to 5, who alone contested the suit, plaintiffs 2 to 6 were joined as plaintiffs.

3. Prior to the filing of the suit a sum of Rs. 5,578-2-0 had been paid by the purchasers of the hypotheca by a draft, dated 27th August, 1958. The plaintiffs claimed that there was a balance of Rs. 9,397-48 and the suit was for recovery of the said sum.

4. Defendants 3 to 5 adopted a common defence. They stated that when the fourth defendant purchased the hypotheca on 15th February, 1957, only a sum of Rs. 5,000 for principal and Rs. 578-2-0 for interest due and that this amount had been paid so that there was no further amount due to the plaintiffs. The objection was also taken to the maintainability of the suit on the ground that there was a division in the joint family of the plaintiffs and that the first plaintiff alone could not have filed the suit without impleading the other plaintiffs. It is in response to this objection that plaintiffs 2 to 6 came on record. But by the time they were impleaded on 7th December, 1972, the claim on the mortgage would be barred by time.

5. The learned District Judge before whom the suit came up for trial held that the plea of defendants 3 to 5 that no interest was due on the mortgage bond on the date of sale apart from the sum of Rs. 578-2-0, which was paid, was not true. He further held that when the sum of Rs. 5,578-2-0 was paid on 27th February, 1958 the mortgagee was not competent to appropriate the sum first towards interest and then towards principal and in his view a sum of Rs.4,190-73 would be due to the plaintiffs. He, however, dismissed the suit on the ground that the family of the plaintiffs became divided in status and that the first plaintiff could not by himself institute the suit. In his view, all the mortgagees should have joined in filing the suit and if any of them refused to join, they should have been impleaded as defendants and the omission to implead them within time would entail the dismissal of the suit. The result was the suit was dismissed and the plaintiffs have filed the present appeal.

6. Two contentions have been taken before me by the plaintiffs. The first is that there was no partition in the joint family of the plaintiffs in so far as the mortgage was concerned and that the first plaintiff was entitled to file a suit for recovery of the mortgage amount on behalf of the family, whose money was advanced. The second contention was that when the sum of Rs. 5,578 2-0 was paid on 27th August, 1958, not only a sum of Rs. 578-2-0 was due as interest, but also further amounts and that the mortgagee was entitled to appropriate the amount of Rs. 5,578-2-0 paid first towards interest and then towards principal.

7. Thus, two questions arise for consideration. They are:—

1. Whether there was a complete partition in the family of the plaintiff so that the first plaintiff could not represent the family thereafter?

2. Whether the sum of Rs. 5,578-2-0 paid by the defendants could have been first appropriated towards interest and then towards principal.

8. Order 34, rule 1 of the Code of Civil Procedure provides that all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

9 *In Mohammed Ismail Maracair and others* v. *Doraisami Mudaliar and others*[1] a Bench of this

1. I.L.R. (1958) Mad. 1066: 71 L W 606: (1959) 2 M.L.J. 74: A.I.R. 1958 Mad. 621.

Court had to deal with a case where a mortgage had been executed in favour of one Rokia Bi. She died in 1937, leaving as her heirs four sons and one daughter. One of the sons, Mohammed Sultan was adjudicated an insolvent. The other heirs filed a suit to recover the mortgage debt only in regard to their 7/9th share in mortgage. Unfortunately they did not make either Mohammed Sultan or the Official Receiver, in whom his estate had vested on insolvency, as a party to the suit. On objection being taken by the defendants, the Official Receiver was brought on record at a time when the suit on the mortgage was barred by limitation. The question before this Court was whether the suit was maintainable and it was held that the persons claiming the mortgage right were the several heirs of Rokia Bi, who jointly got that right by devolution under the law. As the principle is that there is indivisibility of the mortgage both in regard to the debt as well as in regard to the security, it was held that no suit could be filed to enforce a mortgage which entailed the disintegration of either of them. The addition of the Official Receiver after the period of limitation had expired would not render the suit competent on the date on which it was filed. The result was that the mortgage suit had to be dismissed. Thus, the principle is clear that if the amount of the mortgage debt is due to more than one plaintiff, then all of them would have to be parties to the suit. It is in this background that the facts of the present case have to be examined, to see if the integrity of the mortgage is affected here:

10. N.A. Subramania Chettiar, the mortgagee and N.A. Perianna Chettiar, the first plaintiff were undivided brothers. On the death of N.A. Perianna Chettiar in or about the year 1962, the family, according to the plaintiffs, continued undivided, though there was a partial partition with reference to the immovable assets belonging to the family. If so, the integrity of the mortgage would continue, and the first plaintiff could file the suit. It is well settled that a partition between coparceners may be partial either in respect of the property or in respect of the persons making it and it is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties as a joint and undivided family. The earliest case on the point is that of *Appovier v. Rama Subba Aiyan*[1]. In that case Lord Westhury pointed out as follows:—

1. (1866) 11 M.I.A. 75.

"But when the members of an undivided family agree among themselves with regard to a particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided".

11. In *Ramalingam and another* v. *Narayana Annavi and another*[1] the question before the Privy Council was whether the outstandings were joint or divided, the rest of the property consisting of immovables and moveables being joint according to the concurrent findings of the Court. The outstandings related to a money lending business. After extracting the above passage from *Appovier* alias *Sitaram Iyer* v. *Rama Subba Iyer*[2] the Judicial Committee stated the law as follows:—

"It will be thus seen that, under the Hindu Law, it is open to the members of a joint family to make a division and severance of interest in respect of a part of the jointestate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family."

12 The decision in *Appovier* v. *Rama Subba Iyer*[2] was applied by the Supreme Court in *Charandas Haridas* v. *Commissioner of Income-tax*[3] In that case, only the interest of the family in certain managing agencies was the subject of division and it was held that after the division there was practically no undivided family in respect of those assets, the document relating to partial partition having effectively divided it. Per contra, it would follow that the family continues joint *vis-a-vis* other assets. It is pointed out in Mulla's Hindu Law, Fourteenth Edition at page 420, in paragraph 328 (2) that where there is evidence to show that the parties intended to sever, then the joint family status is put an end to, and with regard to any portion of the property which remained undivided

1. (1922) I.L.R. 45 Mad. 489. 43 M.L.J. 428: 49 I.A. 168: A.I.R. 1922 P.C. 201.

2. 11 M.I.A. 75.

3. 1960 S C J. 929; 39 I.T.R. 202: (1960) 3 S.C.R. 296: A.I.R. 1960 S.C. 910.

the presumption would be that the members of the family would hold it as tenants-in-common. When a partition is admitted or proved, the presumption is that all the properties were divided and a person alleging that family property, in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case. The basis of the above principle can be explained as follows: The whole of the joint family property is owned by the joint family which can exercise its rights over any of those assets through its karta. It can alienate an item thereof without thereby affecting its status as a joint family. Just as it can alienate it to a third person, so also it can alienate to its own members. In other words, it can take it out of the class of joint family property and divide it among its members. Consequently, when a joint family divides among its members a part of the joint family assets without intending to sever the family, there is no disruption of the joint status and it remains a joint family. The only effect is that the joint family property is reduced to that extent.

13. It is in the light of these principles Exhibit A-3 may be examined. That was a family arrangement on 15th February, 1968 to which there were three parties *viz*., Perianna Chettiar, the first plaintiff, (2) Subramania Chettiar (the mortgagee) and (3) Pushpam Ammal, the wife of Kandaswami Chettiar, a deceased brother of Perianna and Subramania. In Exhibit A-3 it is recited that there were some misunderstandings amongst them and that with reference to the family properties they had made an arrangement as set out in the document. As regards the amounts due to the family, it is specifically mentioned that they would be the subject of division on a subsequent date, and that till then the outstandings would be looked after by Perianna Chettiar. Regarding the immovable properties it is mentioned in Exhibit A-3 that though they have been divided, the kist etc., would be paid in the same manner as before the said document. The family had house properties and shops. It is stated that there were difficulties in regard to them and that after the difficulties were removed they would be the subject of partition. There are three schedules to the said document; but those schedules do not relate to the outstandings now under consideration. It is clear from the terms of Exhibit A-3 that the parties did not effect a division as regards the outstandings now under consideration whatever may be the position in regard to the other immoveable properties. It is specifically mentioned in the document that these outstandings would be subject of division on a subsequent date. The intention is thus clear that as far as these outstandings are concerned, the parties did not want to become divided.

14. There was a subsequent family arrangement under Exhibit A-8, dated 30th December, 1961 between the second plaintiff and the fifth plaintiff. It was not suggested for the respondents that the said document took us further from what follows from Exhibit A-3. The result is that there is no division between the first plaintiff and the other plaintiffs in regard to the outstandings due to the family and that, therefore, the first plaintiff could himself have maintained the suit for realisation of the mortgage as envisaged by Exhibit A-3 itself. The fact that plaintiffs 2 to 6 were subsequently impleaded in deference to the objection only on 22nd November, 1972 has absolutely no significance as far as the maintainability of the suit is concerned. The suit is thus properly filed and is in time.

15. The next question is as regards the appropriation of the amount paid on 27th August, 1958. Exhibit B-4, dated 15th February, 1957 is a registration copy of the sale deed executed by defendants 1 and 2 in favour of the fourth defendant. The sale is for a sum of Rs. 22,500. It recites various debts having to be discharged by the family of defendants 1 and 2. One of those debts is the mortgage debt now under consideration. After this purchase, the fourth defendant issued a notice on 27th August, 1958 under Exhibit A-1. It is stated therein that under the mortgage of 19th April, 1949 for Rs. 5,000 the principal amount of Rs 5,000 was due and that as on the date of sale *viz*., 15th February, 1959 the interest had been paid and that there only a sum of Rs. 578-2-0 was due towards interest between 15th February, 1957 and 30th August, 1958. Even though there was some dispute as regards the interest amount, the fourth defendant stated that he was enclosing a draft for Rs. 5 578-2-0, which might be accepted and the receipt therefor executed without prejudice to any objections. The relevant words in Exhibit A-1 are as follows:—

"இத்துடன் அசல் ரூ. 5000-மும் அதற்கு 15-2-57 முதல் 30-8-58 வரை யில் வட்டியும் ரூ. 5578-2-0ம் ஆக ரூ. 5578-2-0க்கு தர்மபுரியில் இருக்கும்

ஸ்டேட் பாங்க் ஆப் இந்தியா டிராப்ட் வாங்கியனுப்பியிருக்கிறேன். 15-2-57க்கு முன் வட்டி விஷயமாய் நமக்கு தகராறு இருந்தபோதிலும் உம்முடைய எதிரி வாதங்களுக்கும் அக்கரைக்கும் விரோதமில்லாமல் இந்த தொகையை பெற்றுக் கொண்டு ரசீது அனுப்பவேணுமாய் கேட்டுக் கொள்ளுகிறேன். அப்படி நீர் இதை பெற்றுக் கொள்ள மறுத்தால் இனி வட்டிக்காவது செலவு தொகைக்காவது நான் ஜவாப்தாரியில்லை என்பதை அறியவும்.''

16. The learned counsel for the respondents contended that this is a clear case of payment of Rs. 5,000 for principal and Rs. 578-?-0 for interest and that the creditor was bound by this appropriation. The learned counsel for the plaintiffs submitted that there was, in fact, no such appropriation and that the appropriation had not been accepted by or on behalf of the plaintiffs.

17. Section 59 to 61 of the Indians Contract Act deal with appropriation of payments. They run as follows:—

> "59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted must be applied accordingly."

> "60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it, at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."

> "61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately".

18. It has been held in several decisions that these provisions applied only to a case where more than one amount of debt is due from one party to the other.

19. In *Jia Ram* v. *Sulakhan Mal*[1], it was held that sections 59 to 61 embody the general rules as to appropriation of payments in cases where a debtor owes several distinct debts to one person and voluntarily makes payment to him and that they do not deal with cases in which principal and interest are due on a single debt, or where a decree has been passed on such a debt, carrying interest on the sum adjudged to be due on the decree. To a similar effect is a decision of the Bombay High Court in *Harkisondas Lakshmidas* v. *Pyarathi*[2] The present case being one of a single debt, the provisions of sections 59 to 61 have no scope for application.

20. The question has now to be considered in the light of the general principles applicable to appropriation of payments as found outside the statutory law of contracts. *Parry's Banking Company* v. *Yates*[3] referred to the rule applicable to such cases as follows:—

> "The defendant's counsel relied on the old rule that does no doubt apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid would be depriving the creditor of the benefit to which he is entitled under his contract."

21. This rule was applied by the Judicial Committee in *Meka Venkatadri Appa Raja Bahadur Zamindar Garu and others* v. *Raja Parthasarathy Appa Rao Bahadur Zamindar Garu.*[4] In that case a partition was claimed in respect of two estates. The trial Court decreed the claim in regard to one and rejected it in regard to another. On appeal, the High Court granted a decree for partition in respect of both the estates A receiver was appointed to be in charge of the estates, who made deposits of the income which were withdrawn as if the income from both the estates was divisible. There was an appeal to the Privy Council against the judgment of the High Court decreeing the claim for partition in both the estates. The Privy Council reversed the High

1. A.I.R. 1941 Lah. 386 (F.B).
2. A.I.R. 1927 Bom. 479.
3. (1898) 2 Q.B.D 460.
4. (1921) 48 I.A. 150: I.L.R. 44 Mad. 570: 40 M.L.J. 549: 14 L.W. 25: A.I.R. 1922 P.C. 233.

Court's decision and restored the judgment of the District Judge. The result was that the claim for partition in regard to one of the estates stood negatived. However, during the pendency of the appeal before the Privy Council, the amounts realised by the Receiver had as stated earlier been withdrawn by the plaintiffs. The amounts so withdrawn had to be returned along with interest under orders of Court. On 15th December, 1916 the High Court directed that the whole amount should carry interest from the date of the order and that the monies received should be treated as though they had been received in respect of the principal and not in respect of the interest. It is this appropriation that was the subject of the appeal to the Privy Council. The Privy Council held that there was a debt due that carried interest and that the rule which was well-established in ordinary cases was that the money was first applied in payment of interest and then when the interest was satisfied in payment of the capital. It is in this connection that the decision of the Court of Appeal in *Parrys Banking Company* v. *Yates*[1] was referred to with approval.

22. In *Raj Bahadur Seth Nemichand* v. *Seth Radha Kishen*[2] the same question arose on the following facts. There as a mortgage of 12th December, 1890 for Rs 30,000 carrying interest at 7½ per cent. Upto 11th August, 1893 a sum of Rs. 11 334-6-6 had been paid. Out of it Rs. 4.6 2-6-6 was credited to interest which was due upto that date, and the balance of Rs. 6,682 to principal. The result was that the principal of Rs. 30 000 was got reduced by Rs. 6,682 to Rs 23,318. There were subsequent payments. The plaintiff sued for realisation of the amount due under the mortgage and he contended that the payments made subsequently should be appropriated only towards interest The defendant's point was that they should be credited only to the principal and the interest calculated on the balance alone. The Privy Council referred to the decision in *Meka Venkatadri Appa Rao Bahadur Zamindar Garu and others* v. *Raja Parthasarathy Appa Rao Bahadur Zamindar Garu*[3] which had been rendered earlier, though reported later in A.I.R. Even before the Privy Council the reported decision was available in *Appa Rao Bahadur Zamindar Garu* v. *Raja Parthasarathy Appa Rao Bahadur Garu*[1]. The legal position was stated as follows:—

"A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to ....principal. If he did so, the creditor, need not accept the payment on those terms, but *then he must give back the money or the cheque* by which the money is proferred. If he accepts it, he would then be bound by the........ appropriation proposed by the debtor". (Italic ssupplied).

23. On the strength of the above passage it was contended for the defendants that if the plaintiffs did not accept the draft for Rs. 5.578-2-0 by appropriating the sum of Rs. 5 000 to the principal and Rs.578-2-0 to interest, then they must have returned the draft and that if they did not do so, the appropriation as suggested by the defendants would be binding on the plaintiffs. According to the defendants the plaintiffs would only be entitled to the balance of interest and as far as the principal sum was concerned, no interest would run after the said date.

24. The Supreme Court in *Meghraj and others* v. *Mst. Baybai and others*[2] examined the problem relating to the rule of appropriation in context to the following facts: There was a firm of 10 partners in whose favour there was a mortgage for a sum of Rs 40,000. A suit was filed by the mortgagee and a decree was obtained There was an appeal against the suit to the High Court, which dismissed it subject to a slight modification There was a further appeal to the Supreme Court. During the pendency of that appeal 9 out of 10 partners of the firm migrated to Pakistan and were declared evacuees. The Custodian of Evacuee Property was impleaded as a party to the appeal filed by the mortgagors. The appeal itself was dismissed in August, 1958. Thereafter the sole partner, who remained in India, applied for sale of the property. The Custodian of Evacuee Property

1. (1898) 2 Q. B D 460.
2. A.I.R. 1922 P.C. 26.
3. (1921) 48 I.A. 150: 40 M L.J. 549: A.I.R. 1922 P.C. 233.

1. (1922) 26 C.W N. 33.
2. (1970) 1 S.C.J. 27: (1970) 1 S.C.R. 523: A.I.R. 1970 S. C. 161.

resisted the application. The rights of the partners *inter se* were not decided in the said proceedings. In those proceedings diverse contentions were raised by the mortgagors to the effect that on proper account being taken, nothing was due by them on the mortgage. The learned trial Judge passed a decree for Rs.33,866-51 as principal and Rs.746-30 as interest. The appeal to the High Court was unsuccessful, and on further appeal to the Supreme Court it was contended that certain payments had been made by the mortgagors with special directions that the amounts paid were to be credited towards the principal and that if it was so done, then nothing would remain for payment. There was, however, no evidence on record to show that the mortgagees were informed that the amounts were deposited towards the principal amount due nor was there evidence that the mortgagees accepted the amount towards the principal. The amounts werelying in Court without being withdrawn for a long time. In considering the questions whether the stipulation that the amounts were paid towards the principal and the applications made to the Court were binding on the mortgagees in that case, the Supreme Court pointed out at page 163 as follows:—

> "Unless the mortgagees were informed that the mortgagors had deposited the amount only towards the principal and not towards the interest, and the *mortgagees agreed* to withdraw the money from the Court accepting the conditional deposit, the normal rule that the amounts deposited in Court should first be applied towards satisfaction of the interest and costs and thereafter towards the principal would apply" (Italics added).

Reference was also made to the decision in *Meka Venkatadri Appa Rao Bahadur Zamindar Garu and others* v. *Raja Parthasarathy Appa Rao Bahadur Zamindar Garu*[1].

25. This decision of the Supreme Court envisages that there must be an agreement on the part of the recipient or creditor in regard to the debtor's proposal for appropriation towards the principal. If there was no agreement, then it would follow that the debtor's directions or proposals would not be binding on the creditor. The decision of the Privy Council in *Raj Bahadur Seth Nemichand* v. *Seth Radha Kishen*[2] has not been noticed, apparently because it was not cited. In the above-mentioned case it does not appear that their Lordships of the Privy Council were intending to lay down a law different from what had been laid down earlier in the case reported in *Meka Venkatadri Appa Rao Bahadur Zamindar Garu and others* v. *Raja Parthasarathy Appa Rao Bahadur Zamindar Garu*[1]. The obligation to return the cheque or the draft, as the case may be. cannot be insisted upon as a mattar of course in all cases, without involving an injustice to the creditor. For instance, if a large amount of simple interest along with principal was due from the debtor, then it would, if this view were correct, be open to the debtor to say that he paid only the principal so that further interest does not accumulate. Patent injustice would follow from this. Sections 59 to 61 are based on the rule of English Law enunciated in *Clayton's case*[2]. It is well-known that *Clayton's case*[1] is a case on multiple debts. In the case of single debts, the rule that has been followed even under the English Law is that if a man indebted to another for principal and interest pays the money generally, it shall be applied in the first place to discharge the interest before any part of the principal is discharged. See *Chase* v. *Box.*[3] That case was followed in *Parry's Banking Company Limited* v. *Yates.*[4] If the debtor pays the amount with any stipulation as if it is to be applied only towards the principal, then as pointed out by the Supreme Court in *Meghraj and others* v. *Mst. Bayabai and others,*[5] it should be a matter for agreement. In the absence of any agreement, as such, the unilateral assertion of the one side cannot deprive the other of his right to appropriate it for interest. The principle laid down by the Supreme Court has a greater binding force, being a constitutional obligation cast on Courts and others. The stray observation of the Privy Council in *Raj Bahadur Seth Nemichand* v. *Seth Radha Kishan*[6] in so far as it is out of step with the law laid down by the Supreme Court cannot be followed. Appropriation in the case of a single debt would be governed by agreement and not by the unilateral choice of the debtor. If there was no agreement the general rule of appropriation, first for interest and then towards principal would apply.

1. (1921) 48 I.A. 150: A.I.R. 1922 P.C. 233.
2. A.I.R. 1922 P.C. 26.

1. ((1921) 48 I A 150: I.L.R. 44 Mad 570: 4 M.L J 549: 14 L.W. 25: A.I.R. 1922 P.C 233.
2. (1816) 1 Mer. 608: 14 R.R. 166.
3. 22 E R. 1197.
4. (1898) 2 Q B D 460.
5. (1970) 1 S.C J. 27: A.I.R. 1970 S.C. 161.
6. A.I.R. 1922 P.C. 26.

26. Even assuming that the decision of the Privy Council in *Raj Bahadur Seth Nemichand* v. *Seth Radha Kishen*[1] is to be literally applied the factual position here does not appear to be such as to involve the consequences of returning the draft, failure to do so resulting in the appropriation as made by the debtor having to be given effect to. I have already referred to Exhibit A-1. That merely records the assertions of the defendants that the interest had been discharged upto 15th February, 1957, and that only the balance of principal and interest after that date was due. It is only on that basis that the defendants despatched a draft for Rs. 5,578-2-0. Though it is stated that out of the sum of Rs. 5,578-2-0 Rs. 5,000 towards principal and the balance towards interest was to be appropriated, the facts show that the amount sent under the draft was only disintegrated for purposes of showing how the amount was calculated. I am unable to construe Exhibit A-1 as effecting an appropriation, as such of Rs. 5,000 towards principal and only the balance towards interest. Even as early as 10th October, 19°8 the plaintiffs had rejected the assertions made in Exhibit A-4 and it was also made clear that the amount was being appropriated towards the interest and the balance towards the principal. The defendants left the matter there. It follows that Exhibit A-1 did not stipulate the kind of appropriation that is now envisaged in the contention taken for the defendants. In these circumstances, the conclusion of the Court below as if there was a valid appropriation binding on the plaintiffs is not correct.

27. There will be a preliminary decree as prayed for. Time to pay six months from this date. The appeal is allowed with costs.

R.S. —— *Appeal allowed.*

1. A.I.R. 1922 P.C. 26.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Padmanabhan, J.*

Raghavan and another .. *Appellant* *

v.

Nagammal *alias* **Nagabushnammal and another** .. *Respondents.*

(A) *Hindu Adoptions and Maintenance Ac* (*LXXVIII of* 1956), *sections* 21 *and* 28—*Suit by wife against husband for maintenance—Compromise—Maintenance claim not pressed—Petition by husband for restitution of conjugal rights—Dismissed by Trial Court—Appeal allowed—Husband not taking back wife—Husband keeping another lady as concubine and selling all properties in her name—Suit by wife for maintenance against husband—Charge over properties claimed—Claim allowed by trial Court and charge ovre the properties also granted—Wife entitled to cerge decree.*

(B) *Transfer of Property Act* (*IV of* 1882), *section* 39—*Applicability.*

Under Hindu Law, the maintenance of a wife by her husband is, of course, a matter of personal obligation which attached from the moment of marriage. From the date of the marriage her home is necessarily in her husband's home. He is bound to maintain her in it while she is willing to reside with him and discharge her duties. If she quits him of her own accord, either without a cause or on account of such ordinary quarrels as are incidental to married life in general she can set up a claim for separate maintenance. Under section 2 of the Hindu Married Women's Rights to Separate Residence and Maintenance Act, 1946, a Hindu married woman is entitled to separate residence and maintenance from her husband on grounds stated therein. The doctrine of maintenance of a wife can be traced to the *smritis* and the principal Hindu commentaries upon them. These texts enjoin a mandatory duty upon the husband to maintain his wife. The duty does not depend upon the husband possessing any property. It imposes a personal obligation on him enforceable by the sovereign or state. It does not mean that the obligation is not referred at all to his property and that he can alienate all his property and deprive his wife of the right to maintenance from the ncome of his property. The personal obliga-

*Appeal No. 505 of 1975. 26th April, 1978.

tion on the part of the husband to maintain the wife is even wider in the sense that his obligation will exist even if he has no properties from which he could derive any income. It may be stated that even according to the ancient texts the wife was supposed to be a co-owner of her husband's property though in a secondary sense. [*Para.* 10.]

It is not necessary that the rights to maintenance should become crystallised in the form of a decree to enable the wife to proceed against the property in the hands of the husband or his transferees. Merely because at the time when the settlement deed was executed the wife had not obtained a decree for maintenance would not mean that she will not be entitled to enforce the right of maintenance against the property gratuitously transferred by the husband in favour of the concubine. When once it is seen that the husband had gifted the properties in favour of the concubine without making provision for the maintenance of the wife, then she will be entitled to have a charge created against the very properties and enforce the same. [*Para.* 24.]

Cases referred to:—

Pavayammal v. *Samiappa*, (1947) 1 M.L.J. 329: 60 L.W. 377: A.I.R. 1947 Mad. 376; *Lakshman Ramachandra* v. *Satyabhama*, (1877) I L.R. 2 Bom. 494; *Jamna* v *Machul Sahu*, (1878) I.L.R. 2 All. 315; *Narbadabai* v. *Mahadeo Narayan*, (1880) I.L.R. 5 Bom. 99 *Lakshmi Devi Amma* v. *Naganna*, A.I.R. 1925 Mad. 757; *Manikyam* v. *Venkyamma*, 1956 An. W.R. 1021: A.I.R. 1957 A.P. 710; *Chandramma* v. *M. Venkatareddi*, (1958) I An W.R. 46: (1958) An. L.T 256: A.I.R. 1958 A.P. 396; *Vellayammal* v. *Sri Kumara Pillai*, (1959) 72 L.W 364: A.I.R. 1960 Mad. 42; *K M S Rudrappa* v. *Basamma*, A.I.R. 1962 Mys 207; *V. Tulasamma* v. *Seshareddi*, (1977) 3 S.C.C. 99: (1977) 3 S.C.R. 261: (1977) Rev. L.R. 563: (1977) 2 A.P.L.J (S.C.) 14: A.I.R. 1977 S.C. 1944; *Periambal Chettiar* v. *Sundarammal*, (1945) 1 M.L.J. 8: I.L.R. (1945) Mad. 586: A.I.R. 1945 Mad. 143.

Appeal against the decree of the IIIrd Assistant Judge, City Civil Court, Madras, dated 18th December, 1972, and passed in O.S. No. 3785 of 1970.

R. Alagar and *G. Ranganathan*, for Appellant.

K. Shanmugham, *P. Murugaiyan* and *A.S.A. Tajddin*, for Respondent.

The Court delivered the following.

JUDGMENT.—The defendants in O.S. No. 3785 of 1970 on the file of the City Civil Court at Madras are the appellants. The plaintiffs filed the suit *in forma pauperis* for recovery of maintenance past and future and for the recovery of a sum of Rs. 5,000 for the marriage expenses of the second plaintiff in the following circumstances. The first defendant (first appellant is the husband of the first plaintiff (first respondent). Their marriage took place in 1948 at Madras. The second plaintiff Lakshmi is the daughter born to them. In 1951 the first defendant began to ill-treat the first plaintiff and ceased to look after her and the second plaintiff. The plaintiffs were therefore compelled to file O. S. No. 1829 of 1958 on the file of the City Civil Court for maintenance. That ended in a compromise under which the second plaintiff was awarded future maintenance at the rate of Rs. 35 per month and a sum of Rs. 400 for past maintenance. The claim of the first plaintiff for maintenance was not pressed. Thereafter, the first defendant filed O P. No. 205 of 1961 for restitution of conjugal rights against the first plaintiff. Though the petition was dismissed by the trial Court, this Court ordered restitution in C.M.A. No. 196 of 1963. Subsequent to the disposal of C.M.A. No. 196 of 1963 by this Court, the first defendant has been keeping the second defendant as his concubine in his house and did not bother to take back the first plaintiff to live with him. He also committed default in the payment of monthly maintenance to the second plaintiff. He had settled all his properties in the name of the second defendant his concubine. The plaintiffs therefore filed the suit *in forma pauperis* claiming maintenance for the first plaintiff at Rs. 100 per month, a sum of Rs. 2,880 towards the past maintenance a sum of Rs. 600 for residence and clothing for past three years, Rs. 50 per month for residence and clothing for the future period. A charge is also claimed over the plaint A schedule property. The prayer in respect of the second plaintiff is for future maintenance at the rate of Rs. 65 per month for recovery of a sum of Rs. 2,340 towards past maintenance and a sum of Rs. 5,000 towards marriage expenses. For these amounts also a charge is claimed over the plaint *A*. Schedule property.

2. The first defendant filed a written statement which was adopted by the second defendant. The first defendant contended that the suit was bad for misjoinder of causes of action. He further pleaded that the claim of

the first plaintiff for maintenance was not sustainable on account of the decree for restitution of conjugal rights passed in C.M.A. No. 196 of 1963 on the file of this Court. It was also pleaded that the second plaintiff had married one Arumugam and was therefore not entitle to get Rs. 5,000 for marriage expenses. The second plaintiff's right for enhanced maintenance was also denied. The first defendant further stated that the plaintiffs are not entitled to get a charge over *A* schedule properties as they had been settled in favour of the second defendant for proper and valid consideration. The settlement deed itself was executed since the second defendant undertook to discharge the mortgage which subsisted on the suit properties.

3. The trial Court raised the necessary issues for consideration. The trial Court held that the first plaintiff was entitled to claim maintenance and it fixed the quantum of maintenance at the rate of Rs. 50 per month. It disallowed the claim of the first plaintiff for Rs. 600 for residence and clothing for the past three years and Rs. 50 per month for residence and clothing for the future period. It however held that the frist plaintiff would be entitled to past maintenance for three years at the rate of Rs. 50 per month.

4. As regards the second plaintiff the learned Judge held that she would be entitled to a sum of Rs 1,000 for marriage expenses. He also found that the second plaintiff would be entitled to get maintenance at the rate of Rs. 35 per month and was not entitled to any enhanced maintenance. He further found that the settlement deed was executed gratuitously with knowledge of the plaintiff's right for maintenance over the first defendant and accordingly he further held that the plaintiffs were entitled to a charge for the maintenance amount over the plaint *A* schedule properties. The learned Judge accordingly decreed the suit. Against this decree of the trial Court the defendants have filed the appeal. Sri R. Alagar raised the following two contentions: (1) The learned trial Judge ought not to have created a charge over the plaint *A* schedule properties for the maintenance amount. (2) The learned trial judge having found that the second plaintiff was not entitled to enhanced maintenance should have dismissed the suit as against the second plaintiff in view of the fact that the second plaintiff had already obtained a decree for maintenance in O. S. No. 1829 of 1958 against the first defendant. The learned counsel for the appellants fairly conceded that in view of the fact that it has been admitted that the first defendant is now living with the second defendant, he could not challenge the finding of the trial Court that the first plaintiff would be entitled to maintenance from the first defendant. He was also fair enough to state that he could not assail the quantum of maintenance fixed by the trial Court in favour of the first plaintiff at Rs. 50 per month. The learned counsel also submitted that the sum of Rs. 1,000 allowed by the trial Court in favour of the second plaintiff towards the marriage expenses has alreday been deposited in Court, and this fact was admitted to be correct by the learned counsel for the respondents. He has also now admitted that the second plaintiff has married one Arumugham on 4th July, 1974. The appellants have filed the invitation for the marriage of the second plaintiff, with an application to receive the same as additional evidence under Order 41, rule 27, Civil Procedure Code. The learned counsel for the respondents also does not object to the said additional document being received in evidence. I therefore allow C.M.P. No. 172 of 1978 filed by the appellants and the said letter of invitation is marked as Exhibit B-9.

5. Let me first take up the contention of Sri Alagar that a charge could not be created over the plaint A schedule properties for the maintenance amount. According to Sri Alagar the first defendant had gifted the property to the second defendant, his second wife on 20th June, 1961 and therefore the right to maintenance of the first plaintiff cannot be enforced against the said property. In other words, the contention of Sri Alagar is that the first plaintiff is not entitled to a charge on her husband's property and if that is so then the right to maintenance cannot be enforced against the property that had been gifted to the second defendant by the first defendant under Exibit. B-6. According to learned counsel, section 28 of the Hindu Adoptions and Maintenance Act could not be availed of by the first plaintiff. Section 28 of the Act reads thus:

> "Where a dependant has a right to receive maintenance out of an estate, and such estate or any part thereof is transferred the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous but not against the transferee for consideration and without notice of the right."

6. It is clear from this section that a person whose right to maintenance is protected under the section must be a dependant. A dependant is defined is section 21 of the Act. It is not necessary to extract the entire section 21 herein except to say that a wife is not taken in the definition of the word 'dependant'. In the circumstances, Sri Alagar is well founded in his contention that the first plaintiff will not be entitled to have a charge over the suit properties for her maintenance and that the same cannot be enforced against the property gifted to the second defendant under section 28 of the Hindu Adoptions and Maintenance Act.

7. The only other provision under which the first plaintiff could claim a charge for maintenance against the property of her husband, the first defendant, is under the provisions of section 39 of the Transfer of Property Act. Section 39 of the Act reads thus:

> "Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration without notice of the right, nor against such property in his hands".

8. In the submission of Sri Alagar section 39 of the Transfer of Property Act would not entitle the first plaintiff to have a charge created over the suit properties in respect of her maintenance. According to the learned counsel the liability of a Hindu to maintain his wife under Hindu law is a personal obligation and does not depend upon the fact whether he possessed properties or not. Section 39 would apply only to persons who will be entitled to maintenance from and out of the income from immovable property. So long as a Hindu wife is not entitled to maintenance out of immovable properties of her husband, so argues the learned counsel, she will not be entitled to a charge over the properties of her husband,

9. The question for consideration is whether this submission of the learned counsel is correct. The learned counsel relied upon a decision in *Pavayammal* v. *Samiappa*[1] There, the wife and the daughter of a Hindu filed a suit against him and two of his alienees for maintenance. In the suit they claimed a charge in respect of the properties alienated by the husband and father to the alienees. The question arose whether under section 39 of the Transfer of Property Act the plaintiffs would be entitled to have a charge on the properties alienated. Chandrasekhara Aiyar, J., as he then was, stated as follows:

> "In the first place, it cannot be said of the plaintiffs that they have got a right to receive maintenance 'from the profits of immovable property' when only section 39 will come into play. Secondly, mere knowledge of the legal right would not appear to be enough as, if it were so, there could be no sale by a husband of his properties to third parties without the risk of the wife turning up later and saying that they had notice of her right and that therefore the transferees were bound to recognise her right. What the section contemplates is a claim based on the right to receive maintenance and notice of such claim."

In this view, the learned judge held that no charge could be created under section 39. Certainly, this decision supports the counsel for the appellants. But we have to examine how far this case has been correctly decided and accepted as such by other High Courts and our own High Court later.

10. Before we consider the applicability of section 39 of the Transfer of Property Act in such cases we have to see what the right of a Hindu wife for maintenance against her husband under Hindu Law is. Under Hindu Law the maintenance of a wife by her husband is of course a matter of personal obligation which attached from the moment of marriage. From the date of her marriage her home is necessarily in her husband's house. He is bound to maintain her in it while she is willing to reside with him and discharge her duties. If she quits him of her own accord, either without a cause or on account of such ordinary quarrels as are incidental to married life in general, she can set up a claim for separate maintenance. Under section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 a Hindu married woman is entitled to separate residence and maintenance from her husband on grounds stated therein. The doctrine of maintenance of a wifecan be traced to the smritis and the

1. (1947) 1 M.L.J. 329: 60 L.W. 377: A.I.R. 1947 Mad. 376.

principal Hindu commentaries upon them. These texts enjoin a mandatory duty upon the husband to maintain his wife. The duty does not depend upon the husband possessing any property. It imposes a personal obligation on him enforceable by the sovereign or state. However when it is stated that there is a personal obligation on the part of the husband to maintain the wife it does not mean that the obligation is not referred at all to his property and that he can alienate all his property and deprive his wife of the right to maintenance from the income of his property. The personal obligation on the part of the husband to maintain the wife is even wider in the sense that his obligation will exist even if he has no properties from which he could derive any income. It is unnecessary for me to state the various texts of ancient Hindu Law on this subject as they have been elaborately dealt with and discussed in the various decisions which I shall now presently refer to. But it may be stated that even according to the ancient texts the wife was supposed to be a co-owner of her husband's property though in a secondary sense.

11 As early as *Lakshman Ramchandra* v. *Satyabhama*[1] West, J. considered the Hindu law texts pertaining to the rights of a Hindu woman in her husband's property and pointed out that, by marriage, she acquired an interest in the husband's property though only, according to some writers, of a secondary kind such as may be divested by gift by the husband to a third party.

12. In *Jamna* v. *Machul Sahu*[2] it was ruled by the Allahabad High Court that a wife is, under the Hindu Law, in a subordinate sense a co-owner with her husband and, therefore, the husband cannot alienate his property or dispose of it by a will in such a wholesale manner as to deprive her of her maintenance.

13. In *Narbadabai* v. *Mahadeo Narayan*[3] West, J. made the following observations:

> "The co-ownership of the wife in her husband's property, if that can properly be called ownership at all which involves no independent or co-equal powers of disposition or exclusive enjoyment, is not of a kind that accepts the rules applicable to an ownership in the ordinary sense. Her right to maintenance does not depend on it, for the husband to support her, though he should have no property at all. It is rather a latent right coming into operation only when natural affection which usually prompts the mutual acts of members of families, fails of its proper effect, and law has to step in with its rigid rules and imperfect remedies. Unless she be deserted or the family be divided, the wife is strictly dependent on her so called property. In these events a right to a share of the estate spings up, but till than she has only a right which is completely subordinate. It is not one that she can transfer by individual act, as this is opposed to the theory even of joint ownership. and no substitution is possible of another for herself in the supposed co-ownership with her husband in the common estate. No other could take her place in the joint celebration of the family sacrifices with the family estate or some interest in it must accompany and support. Her right to maintenance is conneceted with the right called co-ownership with her husband and rests on the same conception of a moral identity arising from the marriage relations but the two are rather co-ordinate rights than one the basis of the other. The husband's duty of maintaining his wife is one which he cannot owe to another. Her right as against him is one that she cannot transfer to another."

14. In *Lakshmi Devi Amma* v. *Naganna*[1] Srinivasa Aiyangar, J. stated the law thus:

> It is true that the Hindu Law imposes an obligation on the Hindu husband to support his wife, without any reference to any property or share possessed by him, even as it imposes similar obligation on sons to maintain their mother and father. But when the joint family is possessed of property, a claim by the wife against her husband need not be regarded merely as a suit for the enforcement of any personal obligation, but may well be regarded as a suit against the family itself, represented to her by her husband, through whom alone, so long as he is alive, she has to obtain the relief."

15. The same question arose for consideration before Viswanatha Satsri, J., in *Manikyam* v. *Venkayamma*.[2] The learned judge considered the following questions: Do the words 'right to

1. (1877) I.L.R. 2 Bom. 494.
2. (1878) I.L.R. 2 All 315.
3. (1880) I.L.R. 5 Bom 99.

1. A.I.R. 1925 Mad. 757.
2. 1956 An. W.R. 1021: A.I.R. 1957 A.P. 710.

receive maintenance from the profits of immovable property' occurring in section 39 exclude the case of a wife entitled to claim separate maintenance from her husband, because the obligation of the husband to maintain the wife exists irrespective of his ownership of any property? Does the existence of a personal obligation on the part of the husband negative the right of the wife to be maintained out of his properties, ancestral or self-acquired? Is not the personal liability of the husband something in addition to the liability to maintain his wife out of his properties? Is not the wife entitled to the protection of section 39 and pursue her claim for maintenance against the property of her husband in the hands of a gratuitous transferee who has taken with full notice of her claim, when the husband is left with no other means of providing for the maintenance of the wife? The learned Judge after a due consideration of the relevant authorities on the subject held as follows:

"Though the right of the wife to separate maintenance does not form a charge upon her husband's property ancestral or self-acquired, yet, when it becomes necessary to enforce or preserve such a right effectively, it would be made a specific charge on a reasonable portion of the property. If the right of maintenance is imperilled or jeopardised by the conduct and dealings of the husband or father with reference to his properties, the Court can create a charge on a suitable portion thereof, securing the payment of maintenance to the wife or children."

16. Such a charge could be created not only over the properties in the hands of the husband or father but also over properties transferred by him either gratuitously or to a person having notice of the right to maintenance. A transferee, like the appellant, who joins in a fraudulent and clandestine arrangement for defeating the right of maintenance binding on the conscience of the transferor and who pays no consideration for the transfer by her son in her favour takes the properties subject to that right. The property in her hands is legally chargeable with the payment of maintenance to the wife and children of the transferor under section 39 of the Transfer of Property Act."

It may also be mentioned that Viswanatha Sastri, J., considered the decision of Chandrasekhara Aiyar, J., in *Pavayammal* v. *Samiappa*[1] and held that the said decision was contrary to earlier Bench decisions and dissented therefrom.

1. (1947) 1 M.L.J. 329: A.I.R. 1947 Mad. 376.

17. The right of a Hindu wife to a charge on her husband's properties and to the protection of section 39 of the Transfer of Property Act arose for consideration before a Bench of the Andhra Pradesh High Court in *Chandramma* v. *Venkatareddi*[1]. Subba Rao, C.J. as he the was who spoke for the Bench went into the question in a very elaborate manner. The learned Judge referred to the passages in Manu, Vyasa and Jimutavahma and Apastamba Dharma Sutras and held that the Hindu law texts recognised that a wife by reason of her status, acquires an interest in the property of her husband though according to some writers, not co-equal with him but of a secondary kind. They also impose a personal obligation on him to maintain his wife enforceable by the sovereign or the State. Other texts prohibit a person from alienating all his properties in such a way as to deprive his dependants including his wife of their maintenance. The learned Judge referred to the conflict of views of Chandrasekhara Aiyar, in *Pavayammal* v. *Samiappa*[2] and Viswanatha Sastri, J., in *Manikyam* v. *Venkayamma*[3] and observed thus:

"Chandrasekhara Ayyar, J. in *Pavayammal* v. *Samiappa*[2] in a brief sentence rejected the claim of the wife by stating that it cannot be said of the plaintiffs that they have got a right to receive maintenance from the profits of immoveable property. But, Viswanatha Sastri, J. in *Manikyam* v. *Venkayamma*[3] gave a considered and elaborate treatment to the subject. After considering the different aspects he summarised his view thus at page 1026 (of Andh. W.R.): at p. 713 (of A.I.R.).

"This right to separate maintenance which was previously based on texts and decisions is now expressly conferred by statute under Act XIX of 1946. It is true that the husband or father is under a personal obligation to maintain his wife or infant children. This does not mean that the obligation could be enforced only by sending him to jail in case of default and that the wife or infant children have no right to be maintained out of the property of the husband or the father as the case may be. The rule as to personal obligation only

1. (1958) 1 An. W.R. 46: (1958) An. L.T. 256: A.I.R. 1958 A.P. 396.
2. (1947) 1 M.L.J. 329: A.I.R. 1947 Mad. 376.
3. (1956) An. W.R. 1021: A.I.R. 1957 A.P. 710.

emphasises the legal and imperative duty of the husband to maintain his wife and minor children irrespective of the possession of any property.

18. We respectfully agree with the aforesaid observation. Finally the learned Judge summarised the law in the following words:—

"The Hindu Law texts and the important commentaries impose a legal personal obligation on a husband to maintain his wife irrespective of his possession of any property, whether joint or self-acquired. They recognise the subordinate interest of the wife in her husband's property arising out of her married status. They also prohibit the alienation of properties by the husband which has the effect of depriving her and other dependants of their maintenance. They further treat her as a member of a Hindu joint family entitled to be maintained out of joint funds. The decisions of the various High Courts to the same line, recognise her subordinate interest in her husband's property and enforce his personal obligation by creating a charge on his properties either self-acquired or ancestral. A wife, therefore, is entitled to be maintained out of the profits of her husband's property and, if so, under the express terms of section 39 of the Transfer of Property Act, she can enforce her right against the properties in the hands of the alienee with notice of her claim"

In *Vellayammal* v. *Srikumara Pillai*[1] Ramaswami J. had to deal with a similar situation. The learned Judge dissented from *Pavayammal* v. *Samiappa*[2] and followed *Manikyam* v. *Venkayamma*[3] and *Chandramma* v. *M. Venkatareddi*[4].

19. In *K.M.S. Rudrappa* v. *Basamma*[5] the question that was posed for consideration was whether the plaintiffs, the wife and children were entitled to a charge over the suit properties for the maintenance decree in their favour. It should be remembered that the husband had gifted the properties in favour of others. The same contention was urged before the learned Judges that the obligation of a Hindu husband to provide maintenance to his wife and children was only a personal liability and that it has nothing to do with his property. In other words, an obligation was there irrespective of his possessing any property and that consequently section 39 of the Transfer of Property Act could not be attracted. *Pavayammal* v. *Samiappa*[1] was relied upon in support of the argument that section 39 of the Transfer of Property Act could not be attracted while on the other side the decisions in *Manikyam* v. *Venkayamma*[2] *Chandramma* v. *Venkatareddi*[3] and *Velayammal* v. *Srikumara Pillai*[4] were relied on for the view that the wife and children were entitled to have a charge upon the properties and could enforce the same against the gratuitous transferee. The learned Judge held that *Pavayammal* v. *Samiappa*[1] did not lay down the correct law and chose to follow the other decisions and held that a charge could be created in favour of the wife and minor children over the husband's property.

20. A recent decision of the Supreme Court in *V. Tulasamma* v. *Sesha reddi*[5] though not exactly on the point in controversy before me would show that the basis on which the earlier decisions proceeded in holding that a Hindu wife will be entitled to a charge on her husband's property and claim protection under section 39 of the Transfer of Property Act is well-founded. The learned Judge has referred to the following passage as regards the nature of the liability by the husband as found in Hindu Law by Golapchandra Sarkar Sastri:

"When the husband is alive, he is personally liable for the wife's maintenance, which is also a legal charge upon his property, this charge being a legal incident of her marital co-ownership in all her husband's property. But after his death, his widow's right of maintenance becomes limited to his estate, which when it passes to any other heir, is charged with the same. There cannot be any doubt that under Hindu law, the wife's or widow's maintenance is a legal charge on the husband's estate; but the Courts appear to hold, in consequence of the proper mate-

1. (1959) 72 L.W. 364: A.I.R. 1960 Mad. 42.
2. (1947) 1 M.L.J.: 329: A.I.R. 1947 Mad. 376.
3. (1956) An. W.R. 1021: A.I.R. 1957 A.P. 710.
4. (1958) 1 An. W.R. 46: A.I.R. 1958 A.P. 396.
5. A.I.R. 1962 Mys. 207.

1. (1947) 1 M.L.J. 329: A.I.R. 1947 Mad. 376.
2. (1956) An. W.R. 1021 A.I.R. 1957 A.P. 710.
3. (1958) 1 An. W.R. 46: A.I.R. 1958 A.P. 396.
4. (1959) 72 L.W. 364: A.I.R. 1960 Mad. 42.
5. (1977) 3 S.C.C. 99: (1977) 3 S.C.R. 261: (1977) Rev. L.R. 563: (1977) 2 A.P.L.J. (S.C.) 14: (1978) 1 S.C.J. 26: A.I.R. 1977 S.C. 1944.

rials not being placed before them that it is not so by itself, but is merely, a claim against the husband's heir, or an equitable charge on his estate; hence the husband's debts are held to have priority, unless it is made a charge on his property by a decree."

21. The learned Judge then observed: "To sum up, therefore according to Sastri's interpretation of Shastric Hindu Law the right to maintenance possessed by a Hindu widow is a very important right which amounts to a charge on the property of her husband which continues to the successor of the property and the wife is regarded as a sort of co-owner of the husband's property though in a subornate sense, *i.e.*, the wife has no dominion over the property. Therefore, in the light of the above decisions, I respectfully follow the decisions in *Velayammal* v. *Srikumara Pillai*[1], *Manikyam* v. *Venkayamma*[2]; *Chandramma* v. *M Venkatareddi*[3] and *K M S. Rudrappa* v. *Basamma*[4] and hold that a Hindu wife is entitled to have a charge on the property of her husband and to claim protection under section 39 of the Transfer of Property Act. Once I come to that view, then Ex. B-6 being a gift in favour of the second defendant by the first defendant-husband cannot avail against the right of the plaintiff to have a charge for maintenance amount".

22. The learned counsel for the defendants contended that even at the time of Exhibit B-6 the suit property was subject to heavy liability and after setting off the liabilities the property would be worth really only Rs. 140. I do not agree with this submission of the learned counsel for the defendants or with the manner in which he arrived at the value of the property. In any event, that cannot in any way prevent a charge being created in favour of the first plaintiff over the suit property in respect of the amount decreed for maintenance.

23. Another contention that was put forward by the learned counsel for the defendants is that even assuming that a charge could be claimed under section 39 at the time Exhibit B 6 was executed the first plaintiff had no right to separate maintenance and that consequently no charge could be created and that the right to maintenance cannot be enforced against the second defendant. The argument is elaborated by the learned counsel thus: The settlement was in 1961. In 1965 this Court allowed C.M.A No 196 of 1963 granting restitution of conjugal rights in favour of the first defendants. That meant that the first plaintiff had no right to separate residence and maintenance and that consequently Exhibit B-6 which was executed at the time when the first plaintiff had no right to separate residence and maintenance could not be defeated by any decree for maintenance which might be passed subsequently. The decisions already referred to by me would show that the right of a Hindu wife to maintenance is also interlinked with her interest in her husband's property. The Supreme Court in *V Tulasamma* v. *Sesha Reddi*[1] described the right of maintenance of a Hindu female thus:

> "The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu Such right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right."

24. Where a Hindu husband alienated the whole of his immovable property, though self-acquired, without making a suitable provision for his wife's maintenance it was ruled in *Narbadabai* v. *Mahadeo Narayan*[2] that the alienation would not affect her right to maintenance. So too, where a husband made a gift of his entire estate leaving his wife without maintenance, it was ruled in *Jamna* v. *Machul Sahu*[3], that the donees took the estate subject to her right of maintenance. Where

1. (1959) 72 L.W. 364: A.I.R. 1960 Mad 42.
2. (1956) An.W R. 1021: A.I R. 1957 A P 710.
3. (1958) 1 An.W.R. 46: A.I.R. 1958 A.P. 396.
4. A.I.R. 1962 Mys. 207.

1. (1977) 3 S C R 261: (1977) 3 S.C.C. 99.
2. (1880) I.L R. 5 Bom. 99.
3. (1878) I.L.R. 2 All. 315.

a husband executed a will which had the effect of defeating his wife's right to maintenance it was held in *Periambala Chettiar* v. *Sundarammal*[1] that she was entitled to be maintained out of the estate of her husband. Subba Rao, C.J, in *Chandramma* v. *M. Venkatareddi*[2] held that the restriction imposed on the husband's power to alienate his properties to protect the wife's right to maintenance is indicative of the subordinate interest of the wife in the property and also the link between the obligation and the property of the husband. Viewed on this basis it is not necessary that the right to maintenance should become crystallised in the form of a decree to enable the wife to proceed against the property in the hands of the husband or his transferees. Merely because at the time Exhibit B-6 was executed the first plaintiff had not obtained a decree for maintenance would not mean that she will not be entitled to enforce the right of maintenance against the property gratuitously transferred by the first defendant to the second defendant. When once it is seen that the first defendant has gifted the properties in favour of the second defendant without making provisions for the maintenance of the first plaintiff, then she will be entitled to have a charge created against the very properties and enforce the charges the properties. I therefore overrule the contention of Sri Alagar and hold that the plaintiffs are entitled to a charge over the suit properties in respect of the maintenance decree in their favour.

25. The next contention of Sri Alagar is that the suit as against the second plaintiff ought to have been dismissed as not maintainable on the ground that she has obtained a decree for maintenance in O.S. No. 1829 of 1958. According to the learned counsel a second suit for maintenance is not maintainable. However, the learned counsel concedes that it will be open to the second plaintiff to file a suit for mintenance at an enhanced rate. Now the present suit by the second plaintiff is not merely for maintenance but for maintenance at enhanced rate and also for marriage expenses of Rs. 5,000. In that sense therefore it cannot be said that the suit filed by the second plaintiff is not maintainable. No doubt, a decree for maintenance at the enhanced rate has not been granted but merely because the relief prayed for was not granted would not make the suit not maintainable. Further a decree has been granted in favour of the second plaintiff for Rs. 1000 for marriage expenses. Therefore, I hold that the suit by the second plaintiff was maintainable. Then it is argued that the second plaintiff would not be entitled for maintenance since she has married one Arumugham on 4th July, 1974. As the factum of marriage is not disputed by the counsel for the respondents, I hold that the second plaintiff will not be entitled to maintenance from 4th July, 1974. In the result I confirm the judgment and decree of the Court below subject to this modification that the second plaintiff will be entitled to maintenance only till 4th July, 1974, the date of her marriage with Arumugham. Subject to this modification, the appeal is dismissed with costs.

R.S. —— *Appeal dismissed.*

1. I.L.R. (1945) Mad. 586: (1945) 1 M.L.J. 58: A.I.R 1945 Mad. 193.
2. (1958) 1 An. W.R. 46; A.I.R. 1958 A.P. 396.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

K. Krishnaswami Pillai .. *Appellant**

v.

The Kumbakonam City Union Bank Ltd. and others .. *Respondents.*

Civil Procedure Code. (*V of* 1908), *Order*, 21, *rules* 66, 90—*Suit on mortgage decreed—Execution Petition—Judgment-debtor though served with notice remaining* ex parte—*Sale proclamation settled—Upset price reduced Notice not served on judgment-debtor—Sale of property—Sale not liable be set aside for non-service of notice on judgment-debtor—Non-mention of municipal assessment in sale proclamation only an irregularity—Judgment-debtor by remaining* ex parte *shoud be taken to have waived right.*

In the execution of a mortgage decree by the decree-holder, the judgment-debtor remained *ex parte*. The sale proclamation was settled in his absence. The upset price was fixed at Rs. 1,30,000. Since there were no bidders, the upset price was reduced to Rs. 90,000. Even for this, there were no bidders. So the upset price was again reduced to Rs. 60,000. Ultimately, the property was sold for a sum of Rs. 90 000. To set aside this sale the judgment-debtor filed an application and contended that no notice was served on him when the upset price was reduced from Rs 90,000, that the municipal assessment was not mentioned in the proclamation and that the sale

*A.A.O No. 617 of 1974. *6th April*, 1978.

should be set aside. The application having been dismissed by the executing Court, the judgment-debtor filed an appeal.

Held: Though notice of the execution petition was served on the appellant, he remained *ex parte* all through till the date of sale, and even the original sale proclamation was settled in his absence. The Court could not, therefore say that the non-service of the notice in the application for reduction of the upset price could be taken as a ground for setting aside the sale as urged by the appellant. [*Paras* 6 & 7.]

The non-furnishing of the details as to the municipal assessment in the sale proclamation did not automatically make the sale a nullity. Even on the basis that it was a material fact which had to be given in the sale proclamation, the non-furnishing of such a fact would merely amonut to an irregularity. [*Para*. 8.]

Order 21, rule 66 (2) (*e*) of the Civil Procedure Code is intended for the benefit of the judgment-debtor and could be waived by him even though the statutory provision is in a mandatory form. The appellant had remained *ex parte* throughout in the execution proceedings and even after service of the sale proclamation, he had not approached the Court for getting the particulars of the municipal assessment included in the sale proclamation. Therefore, he should be taken to have waived that right. Even assuming that the appellant had not waived his right, since so long as he had not established the nexus between the irregularity and the alleged inadequacy of the price based on such irregularity, there was no case for setting aside the sale under Order 21, rule 90, Civil Procedure Code. [*Para*. 10.]

Cases referred to:—

Gajadhar Prasad v. *Babu Bhakta Ratan*, (1973) 2 S.C.C. 629: (1973) 2 S.C.J. 570: A.I.R. 1973 S.C. 2593; *Radhey Shyam* v. *Shyam Behari Singh*, (1971) 1 S.C.J. 650 : (1971) 1 S.C.R. 783; A.I.R. 1971 S.C. 2337: *Dhirendra Nath Gorai* v. *Sadhir Chandra Ghosh*, (1965) 1 S.C.J. 219: (1965) 6 S.C.R. 1001: A.I.R. 1964 S.C. 1300; *S.N. Shamsuddin* v. *M.K. Poyyamani*, (1973) T.N.L.J. 398.

Appeal against the order of the Court of the Subordinate Judge, Tiruchirapalli dated 16th October, 1974 and made in E.A. No. 849 of 1974 in E.P. No. 338 of 1972 in O.S. No. 397 of 1971.

T.R. Rajagopalan and *T.R. Rajaraman*, for Appellant.

V. Krishnan and *P. Veeraraghavan*, for Respondent.

The Court delivered the following

JUDGMENT.—This civil miscellaneous appeal arises out of an order passed by the lower Court dismissing the application to set aside a sale in execution, held on 24th October, 1973, filed by the appellant under Order 21, rule 90, read with section 47 of the Code of Civil Procedure.

2. The appellant herein is the judgment-debtor in O.S. No 387 of 1971 on the file of the lower Court. In the said suit a mortgage decree was passed for a sum of Rs. 43 000 and odd. In execution of the said mortgage decree the mortgaged properties were brought to sale in E P No. 338 of the 1972. The appellant-judgment-debtor was served with notice of the said execution petition, but he remained *ex parte*. Since the appellant remained *ex parte* the sale procelamation was settled in his absence. While settling the sale proclamation, the upset price was fixed at Rs. 1,30 000 in the first instance and the sale was held on 1st August, 1973. Since there were no bidders, on an application made by the decree-holder, upset price was reduced to Rs 90,000. Even for that upset price, there were no bidders. Therefore, the upset price was again reduced to Rs. 60,000 and the sale was posted on 24th October, 1973. Ultimately, the property was sold on 24th October, 1973 and the second respondent had purchased the property for a sum of Rs. 90,000. Thereafter, the appellant came forward with an application to set aside the sale of the mortgaged property held on 24th October, 1973 on the following six grounds:— (1) The price fetched is too low. (2) The required details as contemplated by Order 21, rule 66, C.P.C had not been set out in the sale proclamation (3) There has been no due and proper publication of the sale. (4) There has been collusion between the decree-holder and the purchaser in the purchase of the property for a sum of Rs.90,000. (5) The reduction of upset price from Rs. 90,000 to Rs. 60,000 without notice to the petitioner is irregular and, therefore, it vitiates the sale. (6) The judgment-debtor's valuation has not been mentioned in the sale proclamation.

3. The first respondent decree-holder and the Court-auction-purchaser both resisted the

appellant's application for setting aside the sale contending that the price fetched at the Court auction is quite fair and reasonable, that all the requisite details had been given in the sale proclamation, that there has been due and proper publication of the sale proclamation, that there was no collusion between the decree-holder and the Court-auction-purchaser as alleged by the appellant and that the allegation of non-service of notice for reduction of the upset price has not been alleged even in the petition for setting aside the sale.

4. The parties adduced evidence in respect of their respective contentions. The lower Court, after due consideration of the rival contentions of the parties, held that the appellant-judgment-debtor has not established that the price of Rs. 90,000 fetched in the Court auction sale is not the proper price for the property sold, that the materials produced by the appellant for estimating the value of the property, sold indicate that the value can be Rs. 84,000 and that there are no other materials to show that the price of Rs. 90,000 fetched in the auction is not a fair or real value of the property. As regards the appellant's contention that there has been no due and proper publication of the proclamation of the sale, the lower Court finds that there has been due publication and there is no justification for the appellant's complaint about the lack of due publicity. On the question of alleged collusion between the decree-holder and the Court-auction-purchaser, the lower Court specifically finds that the collusion alleged has not been proved and the appellant has not adduced any material to substantiate the plea of collusion. On the allegation that the judgment-debtor's valuation has not been given in the sale proclamation, the lower Court has taken the view that the appellant remained *ex parte* even though he was served with notice of the execution petition that he has come into the picture only after the sale had taken place and that so long as he has not chosen to come on record and give his valuation, he cannot complain that his valuation has not been mentioned in the sale proclamation.

5. As regards the allegation that the upset price has been reduced from Rs.90,000 to Rs. 60 000 without any notice to the appellant the lower Court finds after perusal of the endorsements made on the application for reduction of the upset price that no notice has been ordered to be served on the appellant before reducing the upset price from Rs. 90,000 to Rs. 60,000. The Court below however holds that in the application for setting aside the sale, the non service of notice for reduction of the upset has not been raised as a ground of objection and that therefore, in the absence of an averment in the petition, it must be deemed that the appellant has waived the notice. It is also found by the lower Court that the appellant was present at the time of the auction and he has also signed the sale proclamation wherein the upset price has been stated as Rs. 60,000 as against the upset price of Rs. 90,000 fixed earlier. The appellant did not raise any protest at the time of the sale, nor did he make it a grievance in the application for setting aside the sale. In those circumstances, the lower Court felt that he can no longer be heard to say that the sale is invaid on account of the absence of notice to him in E.A.No. 1129 of 1973 in which the upset price was reduced from Rs. 90,000 to Rs.60,000

6. On this aspect, the learned counsel for the appellant contends that non-service of notice on the judgment-debtor before the upset price once fixed is reduced, will clearly be an irregularity as per the Madras amendment to Order 21, rule 66, C.P.C. In support of this contention, learned counsel refers to the decision of Ismail J., in *S.N. Shamsuddin* v. *M.K. Poyyamani*[1] the gist of which is reported. In that case also, the upset price fixed by the Court was reduced without notice to the judgment-debtor. The judgment-debtor immediately filed a revision petition before this Court for setting aside the order reducing the upset price. The learned Judge held that as the rules themselves now impose a duty on the executing Courts to fix the upset price and mention it in the sale proclamation, once the upset price is fixed and the same forms part of the sale proclamation settled after notice to the judgment-debtor, no material alteration in the sale proclamation can be made without notice to the judgment-debtor. In this view, the order reducing the upset price was set aside, on the ground of want of notice to the judgment-debtor. On the facts of that case, it is clear that originally the sale proclamation was settled in the presence of the judgment-debtor, but the sale proclamation was subsequently altered by reducing the upset price without notice to him. In those circumstances it was held that in the sale proclamation settled in the presence of the judgment-debtor no alteration should take place without notice to him. But such is not the case here. In this case, though notice of the execution petition was

1. 1973 T.N.L.J. 398.

served on the appellant, he remained *ex parte* all through till the date of the sale, and even the original sale proclamation was settled in his absence. Therefore, the principle of that decision may not strictly apply to the facts of this case.

7. Assuming that the said decision were to apply here, that decision will support the appellant only to the extent that there has been material irregularity, in that the notice of applicationfor reduction of the upset price was not given to him. It is well-established that a mere irregularity without anything more cannot be taken advantage of by the judgment-debtor to have the sale set aside. The proviso to Order 21, rule 90, C.P. Code specifically says that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. Even assuming as contended by the learned counsel for the appellant, non-service of the notice of the application for reduction of upset price from Rs. 90,000 to Rs. 60,000 amounted to an irregularity, that cannot be asid to have resulted in any injury to the judgment debtor. Though the upset price was reduced to Rs 60, 00, the property really fetched a price of Rs. 90,000 which was the upset price before it was reduced to Rs. 60,000. Therefore, the appellant cannot now complain that merely because the upset price was reduced from Rs. 90,000 to to Rs. 60 000 the sale of the property for Rs. 90,000 has resulted in any substantial injury to him. If the petitioner has been diligent in resisting the execution petition and has approached this Court before the actual sale for setting aside the order reducing the upset price from Rs. 90 000 to Rs. 60,000 on the ground that no notice has been given to him, perhaps the Court might have set aside that order on the basis of the decision of Ismail, J. in the said case. But, here we are at a stage of setting aside the sale which had already taken place, and at that stage we are faced with the proviso to Order 21, rule 90 C.P. Code. We cannot, therefore, say that the non-service of the notice in the application for reduction of the upset price can be taken as a ground for setting aside the sale as urged by the learned counsel for the appellant.

8. The only other contention that remains to be considered is the one based on the non-furnishing of material details in the sale proclamation as enjoined under Order 21, rule 66 (2) (*f*) C.P. Code. It is the case of the appellant that the sale proclamation on the basis of which the sale has been held in this case did not contain the details of the municipal-tax payable on the property and that such particulars are necessarily to be given under Order 21, rule 66 (2) (*e*) as applicable to Madras. That rule says that every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property should be stated in the sale proclamation as accurately as possible. It is not in dispute that the sale proclamation in this case did not contain the details about municipal-tax levied on the property. Clause (*e*) of sub-section (2) of rule 66 of Order 21, came up for consideration in *Gajadhar Prasad* v. *Babu Bhakta Ratan*[1]. The Supreme Court, after a review of the authorities as well as the amendments to Order 21, rule 66 (2) (*e*) held that the said rule requires the Court to state all the facts it considers material for a purchaser to judge the value and nature of the property himself, and that as such all the essential facts which have a bearing on the material question of the value of the property and which would assist the purchaser in forming his own opinion must be stated in the sale proclamation. According to the Supreme Court, the whole object of Order 21, rule 66 (2) (*e*) of the Code of Civil Procedure was to see that all the material particulars which are necessary to enable the purchaser to form his own opinion as to the value of the property and therefore, the Court should normally state the valuation given by both the the decree-holder as well as the judgment-debtor where they have both valued the property; and it may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment actual rents realised, which could reasonably be expected to affect valuation. The Supreme Court also made it clear that what could be reasonably and usefully stated succinctly in a sale proclamation has to be determined on the facts of each particular case and that no inflexible rules can be laid down on such a question. It is, no doubt, true that in the above decision, the Supreme Court has pointed out that it is desirable to give the municipal assessment also in the sale proclamation as it is one of the material facts to enable the purchaser to form his own value of the property. Even taking the municipal assessment as a material fact to be set out in the sale procla-

1 (1973) 2 S.C.C. 629: (1973) 2 S.C.J 570: A.I.R. 1973 S.C. 2593.

mation, as has been held by the Supreme Court in the above case, the non-furnishing of such a material fact will merely amount to an irregularity. It has to be remembered that Order 21, rule 66 (2) (e) does not specifically refer to the municipal assessment or the property-tax to be specifically stated in the sale proclamation. The Supreme Court has pointed out while considering as to what are the facts to be set out in the sale proclamation under Order 21, rule 66 (2) (e) that it may be useful to set out the municipal assessment also in the sale proclamation. But non-furnishing of the details as to the municipal assessment in the proclamation does not automatically make the sale a nullity. Even on the basis that it is a material fact which has to be given in the sale proclamation, as contended for by the appellant, the non-furnishing of a such a fact will merely amount to an irregularity.

9. As already stated, merely irregularity by itself is not a ground for setting aside the sale. The irregularity should be shown by the judgment-debtor to have resulted in substantial injury and it is only then the sale could be set aside. As a matter of fact, the Supreme Court has pointed out in *Radhey Sheyam* v. *Shyam Behari Singh*[1] that in order to set aside an auction sale, mere proof of material irregularity such as the one under rule 69 and inadequacy of the price realised in such a sale are not sufficient, that what has to be established by the judgment-debtor is that there was not only inadequacy of price, but that inadequacy was caused by reason of the material irregularity or fraud and that a nexus or connection has to be established between the inadequacy of the price and the material irregularity. In this case, the material irregularity pointed out is that the municipal-tax on the property has not not been noted in the sale proclamation and it is stated that the non-furnishing of such particulars in the sale proclamation has resulted in the property fetching a low price. Apart from asserting that the lack of particulars such as the municipal assessment in the sale proclamation has resulted in the property fetching a lesser price, there is no nexus or connection established between the alleged defect in the sale proclamation and the price fetched. Therefore, it is not possible for the Court to set aside the sale under Order 21, rule 90, Civil Procedure Code, merely on the ground that the property-tax assessment has not been mentioned in the sale proclamation. As already pointed out the petitioner was *ex parte* though he was duly served with the notice in the execution petition and all the proceedings in execution have gone on *ex parte*. Therefore for all that has happened the appellant has to blame himself. If really he is interested in safeguarding his rights, he would have moved the Court then and there for issue of a proper sale proclamation containing all the details. In this case, admittedly, the appellant has signed the proclamation. That means, he was aware of the contents of the sale proclamation. Even after knowing the contents of the sale proclamation, he did not take any steps to move the Court for getting all the necessary particulars included in the sale proclamation before the actual sale was held. In this case Ex-B. 2 letter written by the appellant to the decree-holder—1st respondent—indicates that he was aware of the sale proclamation and the intended sale even on 1st August, 1973. That shows that at every stage he was following the Court proceedings. If he has not taken any steps to have any one of the details included as he considers necessary in the sale proclamation, he has only to blame himself.

10. In similar circumstances, the Supreme Court in *Dhirendra Nath Gorai* v. *Sudhir Chandra Ghosh*[1] pointed out that where the judgment-debtor, who received the notice of the proclamation did not object to the non-compliance with the statutory provisions, and no substantial injury had also been shown by him the sale is not liable to be set aside on an application under Order 21, rule 90, Civil Procedure Code. In the same decision, it was pointed out that the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity and if he cannot, it is a nullity. A waiver is an intentional relinquishment of a known right. Even where the mandatory provision has not been followed, if the provision is intended for the benefit of the judgment debtor, then the judgment debtor is entitled to waive that right conferred on him by the statute. There cannot be any dispute that Order 21, rule 66 (2) (e) has been enacted for the benefit of the judgment-debtor and for enabling the auction-purchaser to estimate the price properly. Such a provision which is intended for the benefit

1. (1971) 1 S.C.J. 650: (1971) 1 S.C.R. 783: A.I.R. 1971 S.C. 2337.

1. (1965) 1 S.C.J. 219: (1965) 6 S.C.R. 1001: A.I.R. 1964 S.C. 1300.

of the judgment-debtor can be waived by him even though the statutory provision is in a mandatory form. As already stated, the appellant herein has remained *ex parte* throughout in the execution proceedings and even after service of the sale proclamation, he has not approached the Court for getting the particulars of the municipal assessment included in the sale proclamation. Therefore, he should be taken to have waived that right. Even assuming that the appellant has not waived his right, still so long as he has not established the nexus between the irregularity and the alleged inadequacy of the price based on such irregularity, there is no case for setting aside the sale under Order 21, rule 90, Civil Procedure Code. In this view, we have to uphold the order of the lower Court.

11. The Civil Miscellaneous Appeal is, therefore, dismissed with costs (one set).

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

M/s. NK. Ahammed ... *Petitioner**

v.

The Madras State Housing Board and another ... *Respondents.*

(A) *Arbitration—Madras Detailed Standard Specifications—Same to be part of arbitration agreement—Dispute between parties—Petition for arbitration—Award of arbitrator without notice to parties and without following principles of natural justice—Petition under section 33, Arbitration Act to the Court dismissed—Revision to High Court—Statements and documents filed by parties to be made available to each other—Principles of natural justice not to be excluded—Scope of clause 73 of the Madras Detailed Standard Specifications.*

(B) *Arbitration Act (X of 1940), section 13.*

The petitioner and the first respondent entered into an agreement under which the petitioner was to supply timber and the agreement referred to the Madras Detailed Standard Specifications to form part and parcel of the agreement. Disputes arose between the parties and the petitioner presented a petition to the Arbitrator, the second respondent. The second respondent did not fix any date for enquiry for adjudicating the matters referred to him and on 6th April, 1970, he intimated the petitioner that he had made and signed an award on the arbitration petition. The petitioner filed a petition under section 33 of the Arbitration Act before the X Assistant Judge, City Civil Court, Madras and contended that no opportunity to put forth his case was given to him by the 2nd respondent and that the principles of natural justice had been violated. The petition was dismissed and the learned City Civil Judge held that the second respondent was not bound to follow the rules of judicial procedure and he had conformed to the procedure laid down in clause 73 of the Madras Detailed Standard Specifications. Aggrieved with this order, the petitioner filed a revision to High Court,

Held: Section 13 of the Arbitration Act does not refer to the procedure judicial or otherwise, to be followed by the arbitrator. The absence of prescription cannot clothe the arbitrator with powers to be exercised arbitrarily and throwing to the winds the ordinary canons of judicial procedure. He may not be a Court but still he is in the position of a Judge, selected by the parties in whose sense of justice they have faith and who has to do justice between them. His procedure should be such as a reasonable man would follow in deciding a dispute impartially. [*Para.* 2.]

There was no expression used in clause 73 which specifically excluded notice to the parties of the statements and documents filed by the opposite parties. It contemplated that either party might within a period to be fixed by the Arbitrator, file before the Arbitrator a statement of the case and also all the documents relating to or having a bearing on the case. The parties should know what statements and documents had been filed by the opposite parties. The rule could not be so construed as to exclude such an opportunity. Even if such a construction was possible on the said clause, it would be unreasonable and unfair to adhere to it and exclude such an opportunity being afforded to the parties to the arbitration. [*Para.* 3.]

The principles of natural justice were not to be ruled out in every commercial arbitration. To exclude such principles, there must be an express exclusion by specific rule or a specific term in the contract of the parties, and the dispute referred to the arbitration should be of such a kind as was capable of being decided by the arbitrators fairly and honestly without the due observance of the rules of natural justice. [*Para.* 3.]

* R.P. No. 1019 of 1974. 23rd *March*, 1978.

Even if clause 73 of the Madras Detailed Standard Specifications could be construed as to exclude observance of judicial procedure by the arbitrator, it should not be implemented on the facts of the present case because such an implementation would cause prejudice to the parties and would not secure the ends of justice. [*Para.* 4.]

The Court found that the award of the arbitrator could not be sustained for the reason that the arbitrator had not given notice to the petitioner herein of the statements or records said to have been filed by the first respondent and had not even called upon the petitioner to offer his *explanation* or objections to the same. [*Para* 5.]

Case referred to:

M/s. Phulchand Laxminarayan v. *The India United Mills*, A.I.R. 1961 Bom. 208.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the X Assistant Judge, City Civil Court, Madras dated 30th March, 1972 and made in O.P. No. 171 of 1971.

K. T. Paulpandian, for Petitioner.

K. Venkataswami, Additional Government Pleader, on behalf of Respondents.

The Court made the following

ORDER.—The petitioner in this revision was a party to an agreement with the first respondent herein. That agreement related to the supply of timber by the petitioner to the first respondent. Admittedly disputes arose with reference to the transactions under the agreement and the petitioner herein pursuant to the clause relating to reference to arbitration presented a petition for arbitration before the second respondent who was the arbitrator named in the agreement. It must be pointed out that the agreement between the parties refers to the Madras Detailed Standard Specifications to form part and parcel of the agreement. The second respondent did not fix any date for enquiry for adjudicating the matters referred to him for arbitration and on 6th April, 1970 he intimated the petitioner that he has made and signed an award on the arbitration petition preferred by the petitioner herein. The petitioner herein filed a petition under section 33 of the Arbitration Act, 1940 before X Assistant Judge, City Civil Court, Madras, projecting his main grievance that no opportunity was given to him by the second respondent-arbitrator to put forth and substantiate his case and the principles of natural justice have been violated. The second respondent contended that as per Clause 73 of the Madras Detailed Standard Specifications, which has been invoked and referred to in the agreement for governing the arbitration, he is not bound to hear and receive formal evidence, that on the basis of the records and statements furnished by both the parties he has considered the matter and has passed the award and the award passed cannot be impeached on the grounds put forth by the petitioner. The Court below countenanced the pleas put forth by the second respondent and held that the second respondent arbitrator is not bound to follow the rules of judicial procedure and he has conformed to the procedure laid down in Clause 73 of the Madras Detailed Standard Specifications and the award of the second respondent cannot be set aside on the grounds urged by the petitioner. In this view the petition was dismissed. The present revision is directed against the orders of the Court below in O.P. No. 171 of 1971 which is the petition filed by the petitioner under section 33 of the Arbitration Act, 1940.

2. Thiru K.T. Paulpandian, learned counsel for the petitioner urges that the rules of judicial procedure cannot be deemed to have been excluded by virtue of clause 73 of the Madras Detailed Standard Specifications, the arbitrator is given the role of a Judge. to adjudge the dispute between the parties and it is not open to him to say that even without hearing the parties he can pass an award on the basis of the petition, counter-statement and the documents if any filed by the parties. There is force in the contentions put forth by the learned counsel. The learned counsel also refers to section 13 of the Arbitration Act, 1940. In my opinion in the context it has no relevancy at all for the simple reason it merely states that unless a different intention is expressed in the agreement between or amongst the parties, the arbitrator shall have the powers enumerated thereunder. It does not relate to the procedure judicial or otherwise to be followed by the arbitrator. At the same time absence of prescription of the procedure cannot clothe the arbitrator with powers to be exercised arbitrarily and throwing to winds even the ordinary cannons of judicial procedure. May be, he is not a Court, but, still he is in

the position of a Judge, selected by the parties in whose sense of justice they have faith and who has to do justice between them. His procedure should therefore be such as a reasonable man would follow in deciding a dispute impartially.

8. Mr. K. Venkatasamy, learned counsel appearing for the respondent relies on Clause 73 of the Madras Detailed Standard Specifications and submits that the said Clause lays down that the arbitrator shall not be bound to observe the ordinary rules of procedure applicable to trials before Judicial Tribunals, and he is not to hear or receive formal evidence but he may pass an award on the documents on statements of the case filed by both the parties and or on personal inspection. According to the learned counsel for the respondent this is what has been done in the present case by the second respondent arbitrator and the petitioner could have no grievance on this question. I am unable to agree with this submission made by the learned counsel for the respondent The relevant part of Clause 73 may be extracted for a convenient consideration of the same.

> "Either party may within a period, which shall be fixed by the arbitrator, file before the arbitrator a statement of the case and also all the documents relating to or having a bearing on the case. The arbitrator shall see that the award is passed, if reasonably possible, within a period of four months from the date of his entering upon the reference, but if any extension of that period is considered by him to be necessary, either *suo motu* or on the application of either party to the reference, the parties hereby agree and consent to such extension as the arbitrator may from time to time consider reasonably necessary, and any such extension shall forthwith be communicated by him in writing to each of the parties hereto. The arbitrator shall not be bound to observe the ordinary rules of procedure applicable to trials before judicial Tribunals nor to hear or receive formal evidence but may pass an award on the documents on statements of the case filed by both parties and/or on personal inspection. The arbitrator shall have power to view the subject-matter of the dispute with or without the parties or their agents."

Even a bare reading of the same, does not convey, that the arbitrator functioning under Clause 73 of the Madras Detailed Standard Specifications can ignore the ordinary rules of judicial procedure with reference to putting the parties on notice of the statements and documents filed by the opposite parties. There is no expression used in the said clause which specifically excludes notice to the parties of the statements and documents filed by the opposite parties. It contemplates that either party may within a period to be fixed by the arbitrator file before the arbitrator a statement of the case and also all the documents relating to or having a bearing on the case. It goes without saying, that the parties must know that statements and documents have been filed by the opposite parties. The Rule cannot be so construed as to exclude such an opportunity. Even if such a construction is possible on the said clause, it would be unreasonable and unfair to adhere to it and exclude such an opportunity being afforded to the parties to the arbitration. May be, the ordinary rules of procedure applicable to trials before judicial Tribunals can be said to be excluded. But, that does not mean that he should not even hear the parties and consider their *explanations* or submissions on the statements and documents if any produced by their opponents or by themselves. There is every possibility that ambiguities or doubts may arise with reference to the statements and the documents that may be filed by the parties and it would be very dangerous to say that the arbitrator can decide the questions involved and clear the ambiguities and the doubts by himself without even hearing the parties. Such could not be the import of Clause 73 of the Madras Detailed Standard Specifications. Even if such an import could be spelt out, in my opinion, it should not be given effect to on the facts of the present case for the simple reason it would be violative of the principles of natural justice to give effect to it. The principles of natural justice are not to be ruled out in every commercial arbitration, and for rendering those principles inapplicable, at least two things must co-exist. One is an express exclusion of those principles by a specific rule or a specific term in the contract of the parties and the other, that the dispute referred to the arbitration must be of such a kind as is capable of being decided by the arbitrators fairly and honestly without the due observance of the rules of natural justice. Further, even in these limited cases where rules of natural justice would be said to have

been excluded, if it appears that the arbitrator has not acted fairly or honestly or has acted in an arbitrary manner his award would be open to challenge on the ground of misconduct. To hold otherwise would be opening a door for the perpetration of fraud or rank injustice. Such was the view expressed by a Division Bench of the Bombay High Court in *M/s. Phulchand Lakhminarayan* v. *The India United Mills Limited.*[1]

4. In the present case, the dispute referred to arbitration relates to the discharge of the obligations under an agreement to supply timber of the value of over Rs. 1,00,000. The petitioner herein admittedly issued a notice through his counsel on 30th October, 1968, complaining about the failure of the first respondent to honour the bills for the supplies made by the petitioner. There was a reply by the first respondent through its counsel on 16th December, 1968 whereby the claims of the petitioner were denied. It cannot be stated that the dispute in the present case is of such a nature as is capable of being decided by the arbitrator fairly and honestly without due observance of the rules of natural justice. As adverted to earlier the second respondent in his counter before the Court below would state that he passed the award with records and statements furnished by both the parties. There is no denial that copies of records and statements said to have been furnished by the parties, were not made available to the opposite parties. It is only in that context I am inclined to hold that even if clause 73 of the Madras Detailed Standard Specifications can be so construed as to exclude observance of the judicial procedure by the arbitrator, it shall not be implemented on the facts of the present case because such an implementation will cause prejudice to the parties and will not secure the ends of justice.

5. One of the elementary principles is that the arbitrator must not receive information from one side which is not disclosed to the other, whether information is given orally or in the shape of documents though the rule has sometimes been ignored by mercantile arbitrators whose awards have on this ground been set aside. As stated above, in the present case, the petitioner has not been put on notice of the statements and records said to have been filed by the first respondent, and he has not been called upon to offer his *explanation* over them. This will not be a proper consideration of the questions concerned in the course of arbitration proceedings. I find that the Court below has failed to consider the matter from the proper perspective and has chosen to rely on clause 73 of the Madras Detailed Standard Specifications to negative the case of the petitioner. I find that the award of the arbitrator cannot be sustained for the reason that the arbitrator has not given notice to the petitioner herein of the statements or records said to have been filed by the first respondent and has not even called upon the petitioner to offer his *explanations* or objections to the same. For the above reasons, I am inclined to interfere in revision and hence, this revision is allowed and the award of the second respondent is set aside and the matter is remitted back to the secoud respondent for consideration of the same afresh. The second respondent will furnish the parties at their expense copies of the statements and records, filed by their opposite parties, if that is practicable or if that is not practicable, afford them an opportunity to peruse them at the office of the arbitrator. The arbitrator will further give the parties reasonable opportunity to offer their *explanations* and submissions in writing over such statements and records and if the parties so desire, will hear them on all the questions concerned and then decide the matter in accordance with law. There will be no order as to costs in this revision.

S.J. —— *Revision allowed.*

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1. A.I.R. 1961 Bom. 208.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and S. Nainar Sundaram, JJ.*

The Tamil Nadu Wakf Board represented by its Secretary ... *Appellant**

v.

M. Ebrahim Musuee Muthavalli, Bayan Bai's Wakf and others .. *Respondents.*

Wakf Act (XXIX of 1954), *sections* 3, 36-*A and* 57—*Applicability to deed of wakf-alal-aulad* simpliciter—*Power given to muthavalli to sell property if it becomes dilapidated—Application by muthuvalli for sale of property for the benefit of the wakf—Support by beneficiaries—Sanction given by Court—Application for revocation of the sanction by the Wakf Board—Whether maintainable.*

A Muslim lady executed a deed of of wakf-alal-aulad on 24th January, 1935. Under the deed the usufructs from the endowed properties should be utilised for the benefit of the creator of the wakf and the members of her family, and so long as any member of the family continued to survive no part of the income should be spent for any other purpose and it is only when the entire lineal descendants become extinct the income should be spent for the benefit of poor Muslims, preference being given for Muslim orphans and widows. The question was whether the endowment would constitute a wakf as defined in section 3 (1) of the Wakf Act, 1954 (Central Act XXIX of 1954).

Held: From the use of the expression "to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable" in section 3, the Legislature contemplates that for a wakf-alal-aulad to be a wakf under the Act, there must be a dedication for any purpose recognised by Muslim Law as pious, religious or charitable. That assumes that the purpose of a wakf-alal-aulad *simpliciter* will not be considered to be a purpose recognised by the Muslim Law as pious, religious, or charitable. In the present case, this is purely, a wakf-alal-aulad in the sense that *in presenti* there is no dedication whatever of any part of the property or income for any purpose other than to support the wakif, the members of her family and the descendants. In fact, so long as some descendants of the wakif are alive, the property will be for the benefit of such descendants only and when the entire line becomes extinct, the income from the property will be utilised for the benefit of the poor Muslims, preference being given to Muslim orphans and widows. Whoever may be the ultimate beneficiary, *in praesenti* as far as the present wakf is concerned, nothing is dedicated for any purposes recognised by Muslim Law as pious, religious or charitable. In view of this position, it will follow that the Central Act XXIX of 1954 has no application whatever to the present wakf.

[*Para.* 7.]

In the particular case, there is no dispute that under the terms of the wakf deed, there is no provision for distributing any part of the income *in praesenti* to any person other than the members of the family and so long as even a single member of the family is alive, there is no chance of any poor person coming and taking the benefit under the wakf deed, and therefore the present wakf is a wakf-alal-aulad *simpliciter*. Consequently, it is outside the scope of the Act and therefore section 36-A of the Act has no application and the Wakf Board cannot come and complain under section 57 and seek to revoke the sanction granted by this Court to the muthavalli for alienation of an item of property. It is for Parliament or the State Legislature to consider the desirability or otherwise of undertaking legislation to bring the wakf-alal-aulad *simpliciter* also within the scope of the law relating to the administration of wakfs now in force and at the same time to make suitable and appropriate provisions therein relating to it bearing in mind its distinguishing features.

[*Para.* 8.]

Cases referred to :—

G.M.A. Bhaimia v. *Madras State Wakf Board,* (1968) 1 M.L.J. 410; *Mohamed Mahin* v. *Madras State Wakf Board* (1967) 1 M.L.J. 65: A.I.R. 1968 Mad. 243; *Madras State Wakf Board* v. *Mohd. Mahim,* (1971) 84 L.W. 261 ; *Begum Asma Jafar Imam* v. *State of Bihar,* A.I.R. 1975 Pat. 48 ; *Abdul Fata Mohamad Tshak* v. *Rusonoy Rasamaya Dhur Chaudhry,* (1895) 22 I.A. 76.

Appeal under Clause 15 of the Letters Patent and under Order 36, rule 11, Original Side Rules against the judgment dated 9th July, 1974 of Mr. Justice Sethuraman

*O.S.A. No. 20 of 1975. 27*th March,* 1978.

in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2831 of 1973 in C.S. No. 175 of 1973 (O.S.).

S. Govind Swaminathan for *Habibullah Badsha* and *E.S. Govindan*, for Appellant.

A.A.S. Musthafa, for 1st Respondent.

M.R. Narayanaswami, for 2nd Respondent.

P.K. Gopalraj, for 3rd Respondent.

The Judgement of the Court was delivered by

Ismail, J.— One Halima Bai executed a deed of wakf-alal-aulad and the same was registered on 24th January, 1935. Under the document, several properties belonging to her were endowed as wakf-alal-aulad. Clause (12) of that deed expressly provides that after deducting the disbursements referred to in the earlier clauses from the income of the endowed properties, the surplus should be divided every month by the muthavalli for the time being among the members of her family from children born to her by Mohamad Musa Sait, her husband, including herself and her husband the said Mohamed Musa Sait in the following manner, namely, two shares for a male and one share for a female for ever so long as there are any and until her property lasts, and should it become extinct, then the income shall be expended for the benefit of the poor Mohammedans, preference being given to the bringing up and the maintenance of Muslim orphans and widows. Clause (14) provides that in the event of any of the endowed immovable property described in the schedule thereunder written being dilapidated and being found necessary by the muthavalli to dispose of such property, he shall upon the resolution in writing of the then existing members of family, dispose of the said property and purchase as soon as possible and without any delay another immovable property capable of yielding rent that was derived from the property disposed of when the same was in good and sound condition. Under Clause (16), the muthavalli shall not lease the said property or any portion thereof to any one for a longer period than three years nor shall the muthavalli receive as advance from any lessee more than three months' rents of the property so leased. The provisions of the deed make it absolutely clear that the usufructs from the endowed properties should be utilised for the benefit of the person who created the wakf and the members of her family, and so long as any member of the family continues to survive, no part of the income should be spent for any other purpose, and it is only when the entire lineal descendants become extinct, there is provision for spending the money for the benefit of poor Muslims, preference being given for Muslim orphans and widows. In other words, the nature of the endowment in question was that which is generally under the Mahommedan Law known as wakf-alal-aulad or a private wakf. The wakf is alive.

2. The Wakf Act, 1954 (Central Act XXIX of 1954 hereinafter referred to as the Act) was enacted by the Parliament and under that enactment a survey of wakfs in each State was conducted and Wakf Boards in States were constituted. It is not in dispute that the properties belonging to the endowment in question were held as wakf properties, and the wakf itself was registered as a wakf with the State Wakf Board. Not only that, the first respondent herein namely, the muthavalli, applied to the Wakf Board to grant him permission to sell 17 1/2 grounds of land belonging to the wakf situated in Naval Hospital Road, Periamet, Madras. for the purpose of construction of a building for the wakf at No. 9, Greames Road, Madras-6, and accordingly such permission was granted by the Board for sale of the lands by a resolution dated 13th August, 1971 but the Board has not given permission to utilise the sale proceeds for the construction of the building as proposed by the muthavalli and the matter is said to be still pending.

3. The Wakf Board claimed contribution from several wakfs including the wakf in question. Venkatadri, J., after elaborately referring to the legal position in this behalf, in his Judgment in *G.M.A. Bhaimia* v. *Madras State Wakf Board*[1], held that the Wakf Board will be entitled to claim contribution from a wakf-alal-aulad only to the extent to which the property has been dedicated for pious, religious and charitable purposes as recognised by Mahommedan Law. After this judgment, the muthavalli, the first repondent herein took out C.S. No. 175 of of 1973, namely, the originating summons in the Original Side of this Court under Order 13 of the Original Side Rules. The purpose of this originating summons was to obtain the sanction of this Court for the purpose of

1. (1968) 1 M.L.J. 410.

selling the property, house with door No. 40/1, Malaya Perumal Street, G.T., Madras, for Rs.1,28,000 in favour of the second respondent herein and for the purpose of utilising the sale proceeds for putting up construction at No. 8-A, Greames Road, Madras-6, which is also a property belonging to the wakf. When this application was filed before this Court, the muthavalli stated that the nineteen beneficiaries who were in existence were all agreed to the disposal of the property because the said disposal would be for the benefit of the wakf. After hearing the muthavalli, this Court on 22nd August, 1973 permitted the muthavalli to sell the property in question in favour of the second respondent herein for a sum of Rs. 1,28,000 and from and out of the sale proceeds of the said property, to put up a second floor to the building at No. 8-A, Greames Road, Madras-6. After this sanction was granted by the High Court, the present application, namely Application No. 2831 of 1973 was filed by the State Wakf Board for the purpose of revoking or cancelling the order which this Court passed on 22nd August, 1973. The contention of the Wakf Board was that the property is a wakf property and therefore under section 36-A of the Wakf Act, the muthavalli has no right to sell, gift, mortgage or exchange any wakf property or lease the same for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land or building, without the previous sanction of the Board, and in this particular case, the muthavalli has played a fraud in not obtaining the sanction of the Wakf Board and in not disclosing to this Court the fact that the wakf in question had submitted itself to the jurisdiction of the Wakf Board, and therefore, the permission granted by the High Court will have to be cancelled. The Wakf Board purported to file the application under section 57 of the Act. Sub-section (1) thereof provides that "in every suit or proceeding relating to a title to wakf property or the right of a muthavalli, the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding", and in the absence of a notice under sub-section (2), sub-section (4) provides that the sale, shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this behalf to the Court or other authority under whose order the sale was held.

4. This application filed under section 57 of the Act was resisted by the muthavalli who figured as the first respondent and the purchaser who figured as the second respondent, and our learned brother Sethuraman, J., by his order dated 9th July, 1974, held that the property in question is not subject to the jurisdiction of the Wakf Board and therefore the Wakf Board was not entitled to maintain the application which it filed. Therefore, the learned Judge dismissed the said application. It is against this order of Sethuraman, J., the present appeal has been filed by the Tamil Nadu State Wakf Board.

5. Before we proceed to deal with the matter, it is necessary to refer to certain provisions contained in the Wakf Act referred to already. The Act was enacted by Parliament to provide for a better administration and supervision of wakfs. Section 3 defines certain expressions and the most important of which is the expression "wakf" itself. Clause (1) of section 3 defines that expression as follows:

> " 'Wakf' means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes:
>
> (*i*) a wakf by user;
>
> (*ii*) grants (including mashrut-ul-khidmat) for any purpose recognised by the Muslim Law as pious, religious or charitable; and
>
> (*iii*) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable;
>
> and 'wakif' means any person making such dedication."

6. We have incidentally referred to the substance of the provisions contained in sections 36-A and 57 of the Act. The sole question having regard to the decision of Sethuraman, J., is whether the endowment created by the lady in the present case on 24th January, 1935 would constitute a wakf as defined under section 3 (1) of the Act or not. The whole thing depends upon the meaning of the expressions occurring in section 3 (1) (*iii*) because that alone deals with the case of wakf-alal-aulad.

7. From the use of the expression "to the extent to which the property is dedicated for any purpose gnised by Muslim law as pious, religiou i charitable" the Legislature

contemplates that for a wakf-alal-aulad to be a wakf under the Act, there must be a dedication for any purpose recognised by Muslim Law as pious, religious or charitable. That assumes that the purpose of a wakf-alal-aulad *simpliciter* will not be considered to be a purpose recognised by the Muslim Law as pious, or charitable. We have already referred to the fact that this is purely a wakf-alal-aulad in the sense that *in praesenti* there is no dedication whatever of any part of the property or income for any purpose other than to support the wakif, the members of her family and the descendants. In fact, so long as some descendants of the wakif are alive, the property will be for the benefit of such descendants only and only when the entire line becomes extinct, the income from the property will be utilised for the benefit of the poor muslims, preference being given to Muslim orphans and widows. Whoever may be the ultimate beneficiary, *in praesenti* as far as the present wakf is concerned, nothing is dedicated for any purpose recognised by Muslim Law as pious, religious or charitable. In view of this position, it will follow that the Central Act XXIX of 1954 has no application whatever to the present wakf. That is the view that has been taken by this Court as well as by the other Courts.

8. The earliest pronouncement of this Court on this point is that of Venkataraman, J., in *Mohamed Mahin* v. *Madras State Wakf Board*[1]. The matter was elaborately considered by the learned Judge and as a result of such consideration, the learned Judge came to the conclusion that a wakf-alal-aulad will be a wakf for the purpose of this Act only to the extent to which the properties have been dedicated for the religious and charitable purposes recognised by Muslim Law. Once it is held that there is some property which has been dedicated for a pious, religious or charitable purpose as recognised by Muslim Law, it will be necessary for the Court to determine that extent in appropriate proceedings. According to the learned Judge, a wakf-alal-aulad as such without there being some property *in praesenti* dedicated for any purpose such as pious, religious or charitable, will not come within the scope of the term "wakf" as contained in section 3 (1) of the Act. This view of Venkataraman, J., was approved by a Bench of this Court in *Madras State Wakf Board* v. *Mohamed Mahim*[1]. The next decision which dealt with the present wakf itself is that of Venkatadri, J., in *G.M.A. Bhaimia* v. *Madras State Wakf Board*[2]. The question came before this Court in the context of the controversy raised by the muthavallis of several wakfs when the Wakf Board demanded contributions from them. The learned Judge against the background of the earlier Mahommedan Law authorities as well as the decisions of Courts came to the conclusion that a pure wakf-alal-aulad will not come within the scope of the Central Act, and only a wakf-alal-aulad in which some property has been dedicated *in praesenti* for the purpose recognised by Muslim Law as pious, religious or charitable, will come within the scope of the Act. The learned Judge after referring to the relevant provisions of the statute and the earlier history of the legal position observed as follows:

> "The State Wakf Board may, with the best of intentions, resort to enhance the wakf funds, in order to devote and utilise the funds for welfare objects. But the Board cannot on that account, under the guise of the historical theory of wakfs under the Mahammedan Law demand or claim or collect contribution from the muthavallis of private wakfs, *simpliciter*, *i.e.*, where properties are solely dedicated for the benefit of the settlor and his descendants. Even in the case of composite wakfs created for the benefit of the family and descendants and for pious, charitable and religious purposes the Board can claim contribution only in respect of the income from properties set apart for pious, religious and charitable purposes in the wakf deed."

This decision is really in favour of the first respondent herein. The decision of Venkatadri, J., referred to above was followed and approved by a Bench of the Patna High Court in *Begum Asma Jafar Imam and another* v. *State of Bihar and others*[3]. That was also the case of a private wakf. The question came to be considered whether the Central Act had any application to such a wakf or not. The learned Judges elaborately considered the legal position in this behalf and observed as follows:

1. (1967) 1 M.L.J. 65: A.I.R. 1968 Mad. 243.

1. (1971) 84 L.W. 261.
2. (1968) 1 M.L.J. 410.
3. A.I.R. 1975 Pat. 48.

"From a bare reference to the definition of 'wakf' in the 1954 Act, it is obvious that a wakf-alal-aulad has been specifically included; but by using the words 'to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable' after the words 'wakf-alal-aulad' in section 3 (1) (*iii*) of the Act, it appears that the provisions of the Act have been made applicable only to the properties which have been dedicated for any of the purposes mentioned above. If the intention of the legislature was that the provisions should be applicable to all wakfs-alal-aulad and to all the properties covered by such deeds, it would have simply said, after defining 'wakf', 'and includes wakf-alal-aulad'. If it is held that all wakfs-alal-aulad and every part of them are included in the definition of 'wakf', then the words 'to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable', will become surplusage and redundant. It is a settled canon of interpretation that a statute is not supposed to use words without a meaning and it is better to adopt the construction which would give some effect to the words, rather than that which will give none."

Thus, having regard to the definition of the term 'wakf" contained in section 3 (1) (*iii*) of the Act, it is clear that the Wakf Board will have jurisdiction only to the extent to which property has been dedicated for any purpose recognised by Muslim law as pious, religious or charitable and this must be in addition to the provision for the members of the family and descendants."

8. In the particular case, we have shown and there is no dispute that under the terms of the wakf deed, there is no provision for distributing any part of the income *in praesenti* to any person other than the members of the family, and the poor Muslims come in only in the event of the entire line in the family becomes extinct and so long as a single member of the family is alive, there is no chance of any poor person coming and taking the benefit under the wakf deed, and therefore the present wakf is a wakf-alal-aulad *simpliciter* and consequently it is outside the scope of the Act and therefore section 36-A of the Act has no application. Consequently, the Wakf Board cannot come and complain under section 57 and seek to revoke the sanction already granted by this Court. This is sufficient for the disposal of the appeal, and the result is that the order passed by this Court already granting permission to sell the property on 22nd August, 1973, cannot be cancelled, with the consequence that the dismissal of Application No. 2831 of 1973 filed by the appellant herein by our learned brother Sethuraman, J., is correct and does not call for any interference. The appeal therefore fails and the same is dismissed. There will be no order as to costs.

9. However in view of certain submissions made before, us, we would like to make a few observations before parting with the case. It is not necessary to elaborately go into what constitutes a pious, charitable or religious purpose under the Muslim law so that a wakf can be created for the said purpose. Under the Muslim law as explained and practised by the Prophet and his followers, a wakf may be created for the benefit of any person or class of persons, or for any object of piety or charity, and it may even be for children that are unborn, and if the person or object in whose favour it is created is not in existence at the time of the creation of the trust, it will be applied for the poor who are the ultimate recipients of all wakfs, unless there are other objects named in the wakf itself. The ultimate provision for 'poor' is for the purpose of importin gan element of permanency to the wakf so that it will not fail under any circumstances; there will always be poor—so it was thought—and the provision for the poor is not the only basis for sustaining the validity of a wakf as having been created for a pious, religious or charitable purpose. The concept of piety and charity according to the Mussalman Law is very wide in its amplitude, connotation and sweep and it is this connotation that had been the basis of the creation of wakfs in the early Islamic history. According to Islamic tradition, "The Prophet of God declared that a pious offering to one's family (to provide against their falling into want) is more pious than giving alms to beggars. The most excellent of sadakah is that which a man bestows upon his family." Therefore, the provision in the wakf for the maintenance of the family and relations of the wakif was itself considered to be a pious and charitable object under the Muslim law, and only under the Hanafi school of law, the wakif, the settlor himself, can participate in the benefit accruing from the wakf. Therefore as far as the Muslim law is concerned, there was absolutely nothing against a wakf being created exclusively for

the benefit of the wakif, the members of his family and descendants because that itself was considered to be a pious and charitable act under the Muslim law. But, unfortunately, the English notions of what constitutes charity had considerably influenced the decisions of the Judicial Committee of the Privy Council in dealing with wakfs created by Muslims. The Judicial Committee of the Privy Council in its decision in *Abdul Fata Mahomed Tshak and others* v. *Rusonoy Pasamaya Dhur Choudhry cnd others*[1], held that such a wakf cannot be valid. For coming to this conclusion, the Judicial Committee pointed out:

"As regards precedents, their Lordships ought tc know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property except that in the case cited the house seems to have been regarded with special reverence—or of the family, or of the donor ....As regards precepts which are held up as the fundamental principles of Mahommedan Law, their Lordships are not forgetting how far law and religion are mixed up together in the Mahommedan communities; but they asked during the arguments how it comes about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life interests, are forbidden; and whether it is to be taken that the very same dispositions which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as a wakf, in the name of God, or for the sake of the poor. To those, questions, no answer was given or attempted nor can their Lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life-interest, that is to say, the wakfnama makes him take as mutawali or manager. But he is in that position for life ; he may spend the income at his will, and no one is to call him to account. That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design.............. ....Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahommedan law, as known and administered in India, but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of wakf, as the learned Judge says they have. But it would be doing wrong to the great lawgiver to suppose that he is thereby commending gifts for which the donor exercises no self-denial, in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income .and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words."

1. (1895) 22 I. A. 76.

10. This decision of the Privy Council gave rise to considerable concern and apprehension among the Muslims of this country which led to the enactment of the Mussalman Wakf Validating Act (Central Act VI of 1913). It is not necessary at this distance of time after what has happened subsequently, to say anything about the judgment of the Judicial Committee referred to above except to point out that the decision of the Judicial Committee was considerably influenced by the doctrine of the English law against perpetuities and the concept of "charity" as known to that law.

11. When the Mussalaman Wakf Validating Act, 1913 was passed, its object was stated to be to remove doubts regarding the validity of wakfs created by persons professing Islam in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes, and it made lawful for a Muslim to create a wakf, which in all other respects is in accordance with the Muslim law. Section 3 of the Act provided as follows :

"*Section* 3.—It shall be lawful for any person professing the Mussalman faith to creare

a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :

(*a*) for the maintenance and support, wholly or partially, of his family, children or descendants ; and

(*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated. Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor, or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

Thus, this remedial enactment came to the help of the Muslim community of this country who were alarmed by the judgment of the Judicial Committee of the Privy Council referred to above. In the proviso to section 3 which we have extracted already, the expression "Mussalman Law" meant the Mussalman law as interpreted by the Judicial Committee, because under the original Mussalman law, even the provision for the members of one's own family would constitute a pious and charitable act. It is this definition contained in the Mussalman Wakf Validating Act, 1913 that would appear to have been adopted by the Central Act XXIX of 1954.

12. It was contended before us that even in the case of a wakf-alal-aulad pure and simple, there is an ultimate dedication for the poor or for a charitable, pious or religious purpose, however remote may be the point of time when such ultimate dedication really takes effect and the ultimate beneficiary becomes entitled to enjoy the usufruct and therefore some machinery or method must be found to see that the wakf properties even in such cases are not dissipated and totally lost. It was brought to our notice that even in the present case, the property would have fetched much more, but still that muthavalli and others joined together and got only a sum of Rs.1,28,000. It was also pointed out that the second respondent is a tenant and while the law prevents the granting of a lease for a period more than three or five years as the case may be, in this case, the lease has been granted for decades. Thirdly it was pointed out that all the beneficiaries of the wakf in this particular case have joined together for obtaining the permission of this court to sell the property for Rs. 1,28,000 and the Court had no means to find out whether the property could fetch more and in a case where all the present beneficiaries join together and sell away the property even without the permission of the Court, there would be nobody to challenge such an alienation because *in praesenti* there is no dedication in favour of any other person and therefore some salutary provision is necessary in the form of control being exercised by the Wakf Board or Court even in such matters. There is considerable substance in these submissions.

13. It may be stated that the wakfs created by Muslims generally fall into two categories. One is public wakfs in the sense that the beneficiaries are members of the public and the other is private wakfs in the sense that public as such are not the beneficiaries and certain specified individuals happen to be the beneficiaries. Even with regard to a private wakf, there may be two kinds. One is a wakf-alal-aulad *simpliciter* as we have in the present case where the public in the form of a poor will come into the picture only when the line of the wakif becomes completely extinct at some future uncertain point of time. The second is a wakf in which there is a dedication or gift *in praesenti* in the sense that a portion of the income from the wakf property is reserved for being spent on strangers and other objects of piety or charity and the other portion being spent for the benefit of the wakif's relations and members of the family. The latter category alone is called generally a composite wakf in the sense that even *in praesenti* it takes the character of a private wakf as well as a public wakf simultaneously. In other words, it is partly private and partly public. From what we have stated already, section 3 (1) (*iii*) takes in only such a composite wakf. It does not take in a wakf-alal- aulad *simpliciter*. Therefore, the question for consideration is whether there is any need to make any provision by way of some check or control against dissipation or deliberate or negligent dealing with the property even in cases of wakf-alal-aulad *simpliciter* so that the ultimate benefit, even though it may be in a very remote future, may still be available.

14. While considering the above question it is relevant to point out certain enactments that were actually in force when the Central

Act XXIX of 1954 came into force. Section 1 (3) of the Act states that it shall come into force in a State to which this Act extends on such date as the Central Government may, by notification in the official Gazette appoint in this behalf for that State. But there is a proviso to this section which states that in respect of any of the States of Bihar, Uttar Pradesh and West Bengal, no such notification shall be issued except on the recommendation of the State Government concerned. The reason for this proviso was obvious. On the date when the Central Act was enacted, in those three States, there were separate and independent Wakf Acts containing elaborate provisions for supervising and controlling the management of wakfs. As far as Bihar was concerned there was the Bihar Wakf Act, 1947, as far as West Bengal concerned, there was the West Bengal Wakf Act, 1934, and as far as Uttar Pradesh was concerned, there was the Uttar Pradesh Muslim Wakfs Act, 1936 subsequently replaced by the Uttar Pradesh Muslim Wakfs Act, 1960. The relevancy of the reference to these Acts is that these Acts contained provisions for the Wakf Board exercising control over purely private wakfs, namely wakfs-alal-aulad *simpliciter* also though to a lesser extent than in the case of other wakfs. It is worthwhile referring to some of the provisions contained in those Acts for the purpose of appreciating the point that is now being made.

15. We may take the case of the West Bengal Wakf Act, 1934 which is the earliest in point of time as between the three Wakf Acts in question. Section 6 (1) of that Act states that 'beneficiary' used with reference to a wakf-alal- aulad means a wakif, any member of his family or descendants entitled to receive any pecuniary or other material benefits from such wakf. Section 6 (10) states that 'wakf' means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Islamic law as pious, religious or charitable and includes a wakf by user. Section 6 (11) defines 'wakf-alal-aulad' as meaning a wakf under which not less than seventy-five per cent of the net available income is for the time being payable to the wakif for himself or any member of his family or descendants. While dealing with the general powers and duties of the Commissioner of Wakfs, section 27 (1) (d) provides that the Commissioner shall keep in his custody the particulars and all other information relating to wakfs-alal-aulad. According to section 32, in the case of a wakf-alal-aulad, a beneficiary or any person entitled under the wakf deed to receive pecuniary or other material benefits either on his own account or on behalf of a religious or charitable institution and in the case of any other wakf, any person interested may make an application to the Commissioner supported by an affidavit to institute an enquiry relating to the administration of a wakf or for the examination and audit of the accounts of a wakf, and the Commissioner, on receipt of such application and the prescribed fee, and on being satisfied from facts set forth in the affidavit that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, shall take such action thereon as the thinks fit, sub-section (1) of section 34 is as follows :—

> 34 (1).—"If after an inquiry under section 32 the Commissioner is of opinion that the affairs of any wakf-alal-aulad have been mismanaged to such an extent as to make it desirable for the protection of the wakf property or in the interest of the beneficiaries that the wakf should be subjected to greater control and supervision, he may recommend to the State Government that such wakf shall for a specified period be subject to the provisions of this Act which are applicable to wakfs other than wakfs-alal -aulad."

Sub-section (2) of this section states :—

> 2. After considering any recommendation of the Commissioner under sub-section (1), the State Government may, if it thinks fit by, notification in the Official Gazetee, direct that for such period as may be specified therein the provisions of this Act which are applicable to wakfs other than wakfs-alal-aulad shall so far as possible apply to the wakf to which the recommendation relates and thereupon, notwithstanding anything contained in this Act, these provisions shall apply accordingly."

Section 35 provides that the Commissioner shall be bound to comply with any request made by the Board for the supply of any information or the production of any document relating to a wakf or for the summoning of any witness whose attendance may be required. With regard to the case of a wakf-alal-aulad, such information will be furnished only for the due performance of any duty of the Board under the Act in relation to such wakf-alal-aulad. Even with regard to the inspection of records and grant of copies, wakf-alal-aulad is not out-

side the place of the relevant provisions of the Act. The enrolment of wakfs contemplates the enrolment of wakfs-alal-aulad also. Section 46-A provides that any question whether a particular property is wakf property or not or whether a wakf is wakf-alal-aulad or not shall be decided by the Commissioner whose decision, unless revoked or modified by a competent Court, shall be final. Section 48 contemplates wakfs including wakf-alal-aulad submitting accounts and section 52 of the Act makes express provision for statements to be submitted by the wakfs-alal-aulad. Section 53 dealing with the bar to transfer of immoveable property of a wakf is a general provision. With regard to annual contribution recoverable from wakfs, wakf-a lal-aulad *simpliciter* is not excluded and the Act provides that in the case of a wakf-alal-aulad the contribution shall be at such rate not exceeding one half of the rate payable by other wakfs. We are merely referring to these statutory provisions for the purpose of pointing out that wakf-alal-aulad *simpliciter* has not been kept outside the pale of the Bengal Wakf Act. 1934. Similar provisions were contained in the other two Acts also. Needless to point out that even in respect of wakf-alal-aulad, some safeguard is necessary against the property being dissipated because in case of every wakf, whether it is a public wakf or a private wakf, the property is vested in the almighty, it is inalienable and non-heritable, and therefore, steps for the purpose of preserving this character of the property, will be absolutely necessary so that in the event of the immediate object having been fulfilled, the ultimate object may not fail. It is for the Parliament or the State Legislature to consider the desirability or otherwise of undertaking legislation to bring the wakf-alal-aulad *simpliciter* also within the scope of the law relating to administration of wakfs now in force, and at the same time to make suitable and appropriate provisions therein relating to it bearing in mind the features that distinguish such a wakf from other wakfs.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and A. Varadarajan, JJ.*

The Government of Tamil Nadu, represented by the Sub-Collector, Mettur

.. *Appellant**

v.

Muthu Goundan and others

.. *Respondents.*

Land Acquisition Act (I of 1894), sections 18 and 25 (1), (2)—Notices under the Act given to owners of the land—Failure of owners to claim enhanced compensation—Effect.

Section 25 (2) of the Land Acquisition Act is a clear bar to award of enhanced compensation to those persons who have not put forth their claim for enhanced compensation.

[*Paras.* 2 *and* 4.]

The question whether a person who has not put forward his claim under section 18 of the Land Acquisition Act is entitled to get enhanced compensation is a pure question of law; as such, the claimants who have not put forward their claim under section 18 cannot have any right to get the enhanced compensation. [*Para.* 3.]

Cases referred to:—

Dilwarsab Babusab Mullasab v. *Special Land Acquisition Officer,* (1975) 1 S.C.C. 158: A.I.R. 1974 S.C. 2333; *Kesava Gounder* v. *Rajan,* (1976) 1 M.L.J. 56: 89 L.W. 205: A.I.R. 1976 Mad. 102.

Appeal against the decree of the Court of the Additional Subordinate Judge, Salem, dated 28th March, 1970 in O.P. No. 148 of 1967.

Miss. Vimala, Government Pleader, for Appellant.

S. Jayaraman, for 1st Respondent.

S. I. Samiullah and *S. M. Hameed Mohideen,* for Respondents 2 and 3.

The Judgment of the Court was delivered by

Gokulakrishna, J.—This appeal has been preferred by the State against the Judg-

*A.S. No. 446 of 1971. 26th *July,* 1978.

ment in O.P. No. 148 of 1967 on the file of the Subordinate Judge, Salem, awarding enhanced compensation to the respondents in respect of the lands acquired in Karuppur Village, Omalur Taluk. O.P. No. 148 of 1967 arises out of the reference made by the Land Acquisition Officer, (Sub-Collector, Mettur) in R.O.C. No. 4886 of 1966 (B2), dated 26th September, 1967 relating to serial No. 2 of award statement No. 1 of 1967, dated 15th March, 1967. Even though the Land Acquisition Officer (Sub-Collector, Mettur) made mention that the claimants wanted enhanced compensation and referred the matter to the Subordinate Judge's Court, under section 18 and section 31 (2) of the Land Acquisition Act it is clear from the records that only claimants 1 and 2 questioned the compensation awarded by the Land Acquisition Officer and also raised a dispute with regard to the ownership of the land acquired by the Government. As far as the third claimant is concerned, she claimed only Rs. 100 per mensem as maintenance for her life. The 4th claimant contended that the lands were inalienable and as such they cannot be acquired and that the entire compensation should be deposited to its credit. Therefore, it is clear that the reference under section 18 of the Act was made only at the instance of the first and second claimants and not at the instance of the third and fourth claimants before the Subordinate Judge's Court, Salem. The first claimant before the Sub-Court who is the first respondent herein is represented by his Advocate Mr. S. Rajaram. The second claimant is dead. The appellant has not taken steps to being the legal representatives of the second respondent-second claimant on record. The third respondent who is the third claimant though served is absent. The 4th claimant-4th respondent is represented by Mr. Hameed Mohideen. The lands acquired are 3.50 acres in S. No. 85|2 and 3.94 acres in survey No. 86|28 in Karuppur Village, Omalur Taluk, Salem District. The lands were acquired for the purpose of constructing a Government Engineering College at Salem. The section 4 (1) notification for acquiring these survey numbers along with survey Nos. 43|1, 45|3, 43|2, 44|3, 44|1 and 45|2 was made on 5th August, 1964. It was claimed by claimants 1 and 2 before the Land Acquisition Officer that a sum of Rs. 20,000 per acre for irrigable lands, Rs. 10,000 per acre for un-irrigable lands, Rs. 12,000 for the well, Rs. 4,000 for the sheds and Rs. 5,195 for the cocoanut trees, should be fixed. The Land Acquisition Officer awarded Rs. 2,697 per acre for the irrigable lands, Rs. 1,913 for the un-irrigable lands, Rs. 8,050 for the well in S. No. 85|2, Rs. 180 for the shed in S. No. 85|2 and Rs. 2,825 for the cocoanut trees in S. No. 85|2 and Rs. 2,200 for the sheds in S. No. 86|2 and Rs. 370 for the cocoanut trees in S. No. 86|2. The Land Acquisition Officer in arriving at these amounts of compensation, relied upon Exhibit B-2, dated 4th April, 1961 and Exhibit B-3, dated 29th May, 1961. In respect of the compensation awarded by the Land Acquisition Officer, the first claimant has filed a statement alleging that the compensation awarded is too low and that it ought to have been awarded at the rate of Rs. 20,000 per acre for irrigable lands, Rs. 10,000 per acre for un-irrigable lands, Rs. 12,000 for the well, Rs. 4,000 for the sheds and Rs. 5,195 for the cocoanut trees, as claimed before the Land Acquisition Officer. The first claimant has also stated that he is in possession of the land for over 20 years and that he is the sole person entitled to compensation. The second claimant has adopted the statement of the first claimant regarding the rates and further contends that the other claimants have no right to receive the compensation amount. The third claimant does not dispute the value fixed by the Land Acquisition Officer and filed a statement alleging that she is entitled to maintenances at the rate of Rs. 100 per mensem till her life-time The 4th claimant does not dispute the value fixed by the Land Acquisition Officer and has contended that the compensation has to be paid to the 4th claimant. The first claimant has filed an additional counter emphasising his right to the property which is not relevant for the reference under section 18 of the Act. On those statements made by the respondents herein, the learned Subordinate Judge, Salem, took up for determination the question as to whether the claimants are entitled to any enhanced compensation and if so to what amount. After discussing the market value of different survey fields, the learned Subordinate Judge relying upon the market value fixed in O.P. No. 160 of 1965 (evidenced

by Exhibit A-12, which has been marked in this case) fixed the compensation at the rate of Rs. 7,000 per acre for the irrigable lands and Rs. 3,430 per acre for the un-irrigable lands and confirmed the value as fixed by the Land Acquisition Officer in the award as far as the buildings, well, trees are concerned. Aggrieved by the compensation fixed by the Additional Subordinate Judge, Salem, as above, the State has preferred the present appeal.

2. The lands were acquired for the purpose of constructing Government Engineering College at Salem. Apart from the lands involved in this case, adjoining lands in Survey Nos. 43|1, 45|3, 43|2, 44|3, 44|1, and 45|2 were also acquired for the very same purpose and the section 4 (1) notification for all these lands was issued on the same day, *i.e.*, 5th February, 1964. Against the award of compensation made by the Sub-Court, Salem, in respect of the lands in the abovesaid survey numbers, in *State of Madras, represented by the Spl. Tahsildar, Omalur* v. *Marimuthu and others*[1], were preferred to this Court by the State, They were disposed of by Veeraswami, CJ., and Sethuraman, J., by their judgment, dated 20th February, 1975, confirming the compensation awarded by the Subordinate Judge, at the same rates mentioned above. It has been admitted before us that the lands acquired in this case are similarly situate as those lands involved in Appeal Nos. 176 to 183 of 1969 and those lands are adjacent to the lands acquired in this case, namely, S.F. Nos. 85|2 and 86|2. All these lands were acquired, as already stated, for the purpose of constructing Government Engineering College at Salem and section 4 (1) notification, dated 5th February, 1964 was issued in respect of all those lands. Hence we have absolutely no hesitation in coming to the conclusion that the compensation awarded by the learned Subordinate Judge in O.P. No. 148 of 1967 is correct and the same has to be confirmed. It is clear from the judgment of the Court below that the Sub-Court dealt only with the reference made under section 18 of the Land Acquisition Act in O.P. No. 148 of 1967, which is the subject-matter of the present appeal and as regards the question of ownership of the acquired lands which is also under dispute between the respondents herein, it is stated that the same is being agitated in a separate O.P. under section 30 of the Act. It is clear from the facts of the case that section 9 notices was issued to the respective claimants and except claimants 1 and 2 who are respondents 1 and 2 herein, the other claimants have not put forth any claim for enhanced compensation over and above the compensation awarded by the Land Acquisition Officer. Hence there cannot be any reference under section 18 of the Act as far as respondents 3 and 4 are concerned. Since every one of the respondents has claimed absolute ownership in the lands acquired in himself, the Sub-Court has discussed the question of enhanced compensation claimed by respondents 1 and 2 herein and has awarded the enhanced compensation as stated *supra*. Section 25 (1) of the Land Acquisition Act (I of 1894), reads:

> "(1) When the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11."

Section 25 (2) reads as follows:

> "(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector."

So it is clear that persons who have not questioned the quantum of compensation awarded by the Land Acquisition Officer, are not entitled to get more than the amount fixed as compensation by the Land Acquisition Officer. This position has been made clear in the judgment reported in *Dilawarsab Babusab Mullasab* v. *Special Land Acquisition Officer*[1], wherein the Supreme Court has held:

> "In the circumstances we are not able to hold that the High Court's judgment is unsupportable though we feel it would have

1. Appeal Nos. 176 to 183 of 1969.

1. (1975) 1 S.C.C. 158: A.I.R. 1974 S.C. 2333.

been better if the High Court had written a more reasoned judgment. Considering also the fact that in three of them appeals at least he parties had not appeared before the Land Acquisition Officer and put forward any specific amount as the compensation due they would not have been entitled to any compensation higher than what was awarded by the Land Acquisition Officer."

Miss. Vimala, the Government Advocate brought to our notice a judgment rendered by Padmanabhan, J., in *K. Ramaswami Reddiar* v. *Special Tahsildar* (*South Arcot District*)[1], wherein the learned Judge refused to accede to the request of the Government when it was represented that inasmuch as the claimant did not specify the amount of compensation which he demanded in response to the notice received by him under section 9 (1) of the Act, the appellant is not entitled to claim any amount higher than the amount awarded by the Land Acquisition Officer. Reading the judgment it is clear that the Government has not taken up this plea either before the Sub-Court or in the grounds of appeal before the High Court. Even though that is the case even in this appeal, the learned Judge in A.S. No. 31 of 1975 has specifically stated that the Government had failed to prove that the claimants have received the notice under section 9 and if the Government have taken this plea before the Court below the claimants would have had an opportunity for objecting to the contentions raised by the State. Thus the judgment rendered by Padmanabhan, J., even though clearly stated that the provisions under section 25 of the Act is penal in nature, still refused to accept the contention of the State inasmuch as the State had not proved that notice under section 9 has been issued to the claimants concerned. As far as the present case is concerned, it is clear from the award given by the Land Acquisition Officer that notice under section 9 of the Act had been issued to the respondents herein. All those respondents have also filed statements before the learned Subordinate Judge regarding their contentions on the question of ownership of the land. Thus it is clear that claimants 3 and 4 had notice and in spite of such a notice they never put forth their claim for enhanced compensation, nor asked for a reference under section 18 of the Land Acquisition Act. On the other hand, claimants 1 and 2 who are respondents 1 and 2 have asked for such a reference and also claimed enhanced compensation. Section 25 (2) of the Land Acquisition Act is a clear bar to award enhanced compensation to those persons who have not put forth their claim for enhanced compensation.

3. In *Kesava Gounder* v. *Rajan*[1], Justice Ramaprasada Rao, as he then was and Justice Natarajan, have held:

"Thus, it is now settled that pure questions of law, though not pleaded, unless waived by parties, can in the discretion of the appellate Court, be permitted to be raised even at the appellate stage, provided sufficient opportunity is given to the other side and no fresh investigation or dealing into facts are undertaken. If a question of law does arise on the facts, but it went unnoticed by both the parties and even so by the trial Judge, there is a legal, indeed a conscious duty on the part of the appellate Court either *suo motu* or on its attention being drawn to it to adjudge upon such a question, even though it is brought up for the first time, and no doubt inordinate delay in the discovery of such a question by the parties may be a ground for the appellate Court to be cautious in the matter of the exercise of its discretion in favour of such a lachy litigant."

The question as to whether a person who has not put forward his claim under section 18 of the Land Acquisition Act, is entitled to get enhanced compensation, is a pure question of law and as such we are of the view that claimants 3 and 4 who have not put forward their claim under section 18, cannot have any right to get the enhanced compensation awarded by the learned Subordinate

1. A.S. No. 31 of 1975, dated 9th January, 1978.

1. (1976) 1 M.L.J. 56: 89 L.W. 205: A.I.R. 1976 Mad. 102.

Judge, Salem. We have already observed that respondents 3 and 4 had sufficient notice under section 9 and in spite of that they have failed to put forth their claim for enhanced compensation.

4. Taking all these aspects into consideration, we are of the view that the learned Subordinate Judge is correct in awarding the compensation. We have already stated that as far as claimants 1 and 2 are concerned, they alone will be entitled to the enhanced compensation if in the reference made under section 30 of the Act, the Court declares their entitlement to receive the same. As far as claimants 3 and 4 are concerned, they are not entitled to put forth their claim for any enhanced compensation.

5. It is stated that a separate O.P. is pending as regards the question of ownership of the lands acquired in this appeal. To the extent to which respondents 3 and 4 were able to succeed in the said petition, they will not be entitled to get enhanced compensation awarded by the Subordinate Judge; but they will be entitled only to get their rights in the compensation awarded by the Land Acquisition Officer. As far as claimants 1 and 2 are concerned, they will be entitled to the enhanced compensation to the extent of their success in the O.P. in which a reference has been made under section 30 of the Act. We refrain from saying anything with regard to the merits of the said claim. With the above observations and holding that the enhanced compensation fixed by the learned Subordinate Judge is correct, the appeal is dismissed with costs of the first respondent alone.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

S. Gopalasami .. *Appellant**

v.

A. B. M. Nagamiah and another .. *Respondents.*

Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), sections 3, 6 and 6-A—Suit for recovery of possession and for damages for use and occupation—Lease of land and trees—Lessee held to be a cultivating tenant—Lessee in arrears of rent—Not entitled to the benefits of the Act — Civil Court barred from granting eviction — Suit held not liable to be transferred under section 6-A—Fifteen days' notice terminating lease—Six months' notice necessary to tenant —Plaintiff entitled only to contractual rent where tenant had put land for use as per agreement.

The respondents had leased to the defendant 1 acre and 12,837 sq. feet of land with trees thereon, the rent payable being Rs. 120 per annum. The lease deed directed that the ploughing of the land and fencing were to be done by the lessee at his own cost. The lease deed further authorised that in the interspace between the trees, the lessee was entitled to cultivate such of the crops as were possible and enjoy the same for himself. The lessee failed to pay the rent and the lessor after terminating the lease by giving 15 days' notice filed a suit for recovery of possession and for damages for use and occupation. The trial Court ordered eviction and granted damages. On appeal by the defendant, the lower appellate Court confirmed the eviction on the ground that the defendant was only a licensee and also confirmed the damages.

On second appeal by the defendants,

Held: The defendant was a cultivating tenant. [*Para.* 6.]

In a case where a cultivating tenant was sought to be evicted on the ground that there was arrears of rent, the Revenue Divisional

* S.A. No. 99 of 1975. *3rd April, 1978.*

Officer alone had jurisdiction and the civil Court would have no jurisdiction. [*Para.* 7.]

The fact that the defendant was in arrears of rent or guilty of denial of title of the landlord to the land demised would enable the Court to proceed with the trial and the suit was not liable to be transferred to the Revenue Divisional Officer. [*Para.* 8.]

Since, in this case, the finding was that the tenant-defendant was in arrears of rent, the suit itself was not liable to be transferred to the Revenue Court under section 6-A of Act (XXV of 1955). But the suit in so far as it related to the prayer for eviction was liable to be dismissed on the ground that section 6 of the Act was a bar for granting a decree for eviction. [*Para.* 8.]

An agricultural lease, under section 106 of the Transfer of Property Act, could be terminated only by six months' notice. Termination of lease by 15 days' notice was not valid. [*Para.* 9.]

Only where the lessee had put the land for any use other than that for which it was leased, the lessor would be entitled to claim reasonable rent. But where it was not the case of the landlord that the lessee had put the land for a different use, he was entitled only to the contractual rent. [*Para.* 9.]

Cases referred to:—

Veluchami Naicker v. *Mouna Guruswami Naicker*, (1957) 2 M.L.J. 628: 1957 L.W. 933; *Chinnamuthu* v. *Perumal*, (1970) 2 S.C.J. 616: (1970) 2 An.W.R. (S.C.) 114: (1970) 2 M.L.J. (S.C.) 114: A.I.R. 1970 S.C. 1197.

Appeal against the decree of the District Judge of East Thanjavur at Nagapattinam in Appeal Suit No. 165 of 1973 preferred against the decree of the Court of the Subordinate Judge of Mayuram in Original Suit No. 55 of 1970.

P. Balagopal, for Appellant.

T. R. Rajagopalan and *T. R. Rajaraman*, for Respondents.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The suit was filed by the respondents herein for recovery of possession of 1 acre and 12,837 sq. feet of land comprised in S. No. 1013|2 with trees, pond, well etc., and for damages for use and occupation. The damages were claimed at Rs. 1,500 per year for three years prior to the suit and at the same rate from the date of the suit till the date of delivery. The plaintiffs' case was that the suit properties were leased to the defendant for a long time and the defendant was executing lease deeds and the last of such lease deeds was executed on 2nd December, 1952. That deed was for a year and after that deed, the defendant was continuing to be the lessee under the same terms and conditions and was paying *paghuthi*. The further case of the plaintiffs was that the defendant was indifferent in paying the *paghuthi* and therefore, by a notice dated 27th June, 1966, they called upon the defendant to pay the arrears and vacate and surrender possession after the expiry of 15 days from receipt of the notice. The defendant had not vacated the same nor paid the rent. Accordingly, the suit has been filed.

2. The main defence was that the defendant is a cultivating tenant entitled to the protection of the Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955) (hereinafter called the Act). The defendant also contended that there was no valid and proper notice of termination of the tenancy and that he continues to be still a statutory tenant. He further contended that he was liable to pay only at the rate of Rs. 60 per annum as rent for the suit properties and that he was not liable to pay any damages much less at the rate of Rs. 1,500 per annum. He offered to pay Rs. 180 for the three years prior to the suit. On the ground that he is a cultivating tenant entitled to the benefits of the Tamil Nadu Act (XXV of 1955), the defendant also pleaded that the civil Court had no jurisdiction to entertain the suit for eviction.

3. The trial Court held that the suit is maintainable for eviction. The trial Court considered the lease deed and thought that it consists of lease of three portions *viz.*, (1) a house; (2) vacant land; and (3) cocoanut garden. In respect of the house and cocoa-

nut garden, the trial Court held that the defendant was not a cultivating tenant and that in respect of the vacant portion, the defendant was a cultivating tenant. Accordingly, the trial Court decreed the suit for possession of the house and the cocoanut garden and dismissed the suit as far as the vacant site is concerned. The trial Court also granted damages in the sum of Rs. 2,250 for three years prior to suit as against the claim of Rs. 4,500.00 The defendant preferred an appeal before the learned District Judge of East Thanjavur. The plaintiffs also preferred cross-objections. The cross-objections related to that portion of the decree where the suit was dismissed, in relation to the vacant land and also the rejection of the portion of the claim of damages. The learned District Judge held that the lease was of the usufructs of the trees, but so far as the land is concerned, the defendant was only a licensee and that therefore, the plaintiffs are entitled to evict him from the entirety of the properties. But the lower appellate Court confirmed the damages given at the rate of Rs. 750 per year for the period of three years prior to the suit. It is against this judgment of the lower appellate Court, this second appeal has been preferred.

4. The first question that arises for consideration is whether the construction placed by the learned District Judge on the lease deed Exhibit A-4 dated 2nd December, 1952 executed by the appellant in favour of the plaintiffs' father was correct and the finding that the defendant was not a cultivating tenant in relation to that property has to be accepted.

5. We are not now concerned with the second item *viz.*, house described in the Schedule to this lease deed Exhibit A-4. We are concerned with the land and the trees thereon. In the Schedule to the lease deed the property leased is described as a garden land of an extent of 1 acre and 12,837 sq. feet comprised in survery No. 1013|2 together with the pond, trees and the well situate within the four boundaries mentioned therein. The lease deed recited that the land belongs to the lessor and that the Schedule mentioned property with the trees thereon are leased to the defendant for a period of one year, the rent payable being Rs. 120 per annum. The lease deed directed that the ploughing of the land and the fencing are to be done by the lessee at his own cost. The lease deed further authorised that in the inter-space between the trees, the lessee is entitled to cultivate such of the crops as are possible and enjoy the same for himself. At the end of the lease period, the lessee has to hand over possession of the suit properties. The terms set out above clearly show that what was leased in favour of the defendant was not only the trees and the usufructs thereof but also the land comprised in Survey No. 1013|2. It is also in evidence that in some portions the defendant had cultivated the land with plantain cultivation and in some other places, with such dry crops like chillies, brinjals, gingelly crops, lady's finger, tomato and cluster beans. The lower appellate Court thought that the terms of the lease deed and the cultivation of plaintains, chillies, brinjal, lady's finger etc., in the interspace did not show that the lease was of the land itself. It held that the defendant was only a licensee in respect of the land and that the lease was only of the usufructs of the trees. In coming to this conclusion, the lower appellate Court mainly relied on the quantum of the lease amount. As seen from the document Exhibit A-4, the lease amount was fixed at Rs. 120 per annum. From this alone one cannot come to the conclusion that the land was not leased but only the usufructs of trees that were leased. It is true that there were as many as 168 cocoanut trees, 8 mango trees, 1 palmyrah tree and 3 jack trees; but the terms of the lease deed are clear. It specifically authorises the lessee to cultivate in between the spaces such crops as are possible and the evidence is that the defendant had been raising plantains, chillies, brinjals, lady's finger, tomato and cluster beans as already stated. The description of the property leased also shows that what was leased is the land and the trees along with the well comprised in Survey No. 1013|2 measuring 1 acre and 12,837 sq. feet. I have, therefore, no doubt that the lease was of the land and the trees and not the usufructs of the trees alone.

6. There could be no doubt that the defendant was a cultivating tenant. There is no dispute that he was contributing his own physical labour and that of the members of his family in the cultivation of the land and enjoying the usufructs. Certainly, therefore,

the defendant is a person who could be called a cultivating tenant within the meaning of section 2 (*a*) of the Act. Admittedly the tenant had not paid rent for three years prior to suit and therefore he falls under section 3 (2) of the Act.

7. On the question whether the civil Court can order an eviction of a tenant falling under section 3 (2) of the Act, the learned counsel for the plaintiffs contended that even though the defendant may be a cultivating tenant since he was admittedly in arrears of rent for more than 3 years prior to the filing of the suit, he would not be entitled to the benefits of the Act and that therefore the plaintiffs could file a suit for eviction and the civil Court can grant a decree for eviction. A number of decisions have been cited. But before considering the decisions, we may note certain provisions in the Act itself which have a bearing on the question. The Act is intended to protect a cultivating tenant from unjust eviction. Under sub-section (1) of section 3, the Act provides that subject to other provisions of that section, no cultivating tenant shall be evicted from his holding or any part thereof, by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise. The conferment of jurisdiction on the Revenue Divisional Officer to order eviction on the application of a landlord and the exclusion of jurisdiction of civil Court on such matters are to be found in section 3 (4) and section 6 of the Act. Since a construction of these two provisions is involved in this case, they may be usefully extracted here:

"3 (4) (*a*). Every landlord seeking to evict a cultivating tenant falling under sub-section (2) shall, whether or not there is an order or decree of a Court for the eviction of such cultivating tenant, make an application to the Revenue Divisional Officer and such application shall bear a Court-fee stamp of one rupee.

(*b*) On receipt of such application, the Revenue Divisional Officer shall, after giving a reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary enquiry into the matter and pass an order either allowing the application or dismissing it and in a case falling under clause (*aa*) of sub-section (2) in which the tenant had not availed of the provisions contained in sub-section (3), the Revenue Divisional Officer may allow the cultivating tenant such time as he considers just and reasonable having regard to the relative circumstances of the landlord and the cultivating tenant for depositing the arrears of rent payable under this Act inclusive of such costs as he may direct. If the cultivating tenant deposits the sum as directed, he shall be deemed to have paid the rent under sub-section (3) (*b*). If the cultivating tenant fails to deposit the sum as directed, the Revenue Divisional Officer shall pass an order for eviction".

"6. *Bar of Jurisdiction of civil Courts.*—No civil Court shall, except to the extent specified in section 3 (3), have jurisdiction in respect of any matter which the Revenue Divisional Officer is empowered by or under this Act to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act".

It may be seen from these two provisions that if a cultivating tenant falls under section 3 (2) the landlord could seek to evict him from the land by filing an application before the Revenue Divisional Officer. Broadly the cases falling under section 3 (2) of the Act are where: (1) the tenant is in arrears of rent; (2) the tenant is guilty of negligence which is destructive of the land; (3) the tenant is guilty of using the land for any purpose other than the agricultural or horticultural in nature; and (4) the tenant had wilfully denied the title of the landlord to the land. Section 6 of the Act excludes the jurisdiction of the civil Court in respect of any matter which the Revenue Divisional Officer is empowered by or under this Act to determine. Under section 3 (4) of the Act, the Revenue Divisional Officer is entitled to determine whther the landlord is entitled to evict the cultivating tenant on the ground that he falls under clause (2) of section 3. Clearly, therefore, in a case where a cultivating tenant is sought to be evicted on the ground that there is arrears of rent, it is the Revenue Divisional Officer

alone that has got jurisdiction and the civil Court would have no jurisdiction. In *Veluchami Naicker* v. *Mouna Guruswami Naicker*[1], a Division Bench of this Court had to consider a similar question. The learned Chief Justice, after quoting section 6 observed:

> "Under section 3, sub-section (4) a landlord seeking to evict a cultivating tenant shall make an application to the Revenue Divisional Officer. It is clear, therefore, that the relief of eviction is a matter which the Revenue Divisional Officer is empowered to deal with and determine".

If that is a matter which the Revenue Divisional Officer is to deal with and determine, clearly, section 6 bars the civil Court's jurisdiction to entertain a suit for relief of that nature.

8. But the learned counsel for the respondents relied on section 6-A which reads as under:—

> "6-A. If in any suit before any Court for possession of, or injunction in relation to, any land, it is proved by affidavit or otherwise that the defendant is a cultivating tenant entitled to the benefits of this Act the Court shall not proceed with the trial of the suit but shall transfer it to the Revenue Divisional Officer who shall thereupon deal with and dispose of it as though it were an application under this Act and all the provisions of this Act shall apply to such an application and the applicant".

He referred to the decisions which had interpreted this section and held that only in a case where it is established that the tenant is not merely a cultivating tenant within the meaning of the Act but also that he had not disqualified himself from claiming the benefits by reason of any of the grounds mentioned in sub-section (2) of section 3 of the Act, that the suit is liable to be transferred to the Revenue Divisional Officer. It is true that in a number of decisions including the decision of the Supreme Court reported in *Chinnamuthu* v. *Perumal*[2], it has been held that in order to transfer a suit, the defendant must prove not only that he is a cultivating tenant but also that he is entitled to the benefits of the Act and unless those two conditions are satisfied, the civil Court is not bound to transfer it to the Revenue Divisional Officer and it can proceed to try and dispose of it itself. In my opinion, the fact that the defendant is in arrears of rent or guilty of denial of title of the landlord to the land demised will enable the Court to proceed with the trial and the suit is not liable to be transferred to the Revenue Divisional Officer. But that itself will not enable the Court to make an order of eviction if the eviction itself on such ground could have been ordered by the Revenue Divisional Officer under the Act. While the Court, is not bound to transfer when it comes to the conclusion that any one of the contingencies mentioned under sub-section (2) of section 3 which disentitles the tenant from protection against eviction exists, section 6-A could not be considered as conferring a jurisdiction on the civil Court to order eviction or providing an exception to section 6 which bars the entertainment of such a suit for eviction. But for section 6-A even if the Court were to hold that the defendant is a cultivating tenant and entitled to the benefits of the Act, it shall have no jurisdiction to transfer the suit to the Revenue Divisional Officer. It may have to dismiss the suit as not maintainable. Section 6-A of the Act only enables the Court if it comes to the conclusion that the defendant is a cultivating tenant and entitled to the benefits of the Act to transfer it to the Revenue Divisional Officer. But in a case where the Court comes to a conclusion that the landlord is seeking to evict a tenant on the ground that one of the grounds mentioned in section 3 (2) of the Act is available, the Court had to dismiss the suit on the ground that such a suit in so far as it related to relief of eviction is barred under section 6 and could not be transferred to the Revenue Divisional Officer under section 6-A. If the civil Court finds that section 3 (2) is attracted, it may be asked what purpose is served in dismissing the suit and directing the plaintiffs to have recourse to section 3 (4) of the Act as on the ground that section 3 (2) is attracted, the landlord

1. (1957) 2 M.L.J. 628: 1957 L.W. 933.
2. (1970) 2 S.C.J. 616: (1970) 2 An.W.R. (S.C.) 114: (1970) 2 M.L.J. (S.C.) 114 : A.I.R. 1970 S.C. 1197.

will be entitled to an order for eviction from the Revenue Divisional Officer and the relief could be given by the Court itself. I am aware of the futility of the exercise. But that is so even in the case of section 6-A. If section 6-A is applicable, after the transfer the Revenue Divisional Officer has to simply dismiss the petition for eviction as the grounds on which he can order eviction are those found under section 3 (2) of the Act and those grounds have been found by the civil Court as not existing or available. That is the scheme of the Act and we cannot have any quarrel with it. It is also true in all those cases where section 6-A was considered where the Courts held that the suit is not liable to be transferred under section 6-A, the suit itself was dealt with on merits and disposed of. We have already seen that only in respect of matters which the Revenue Divisional Officer could determine under section 3 (4), the civil Court's jurisdiction is barred under section 6 of the Act. Therefore, in cases where section 6-A is not applicable, the suit is maintainable in so far as those reliefs which could not be asked for before the Revenue Divisional Officer but in respect of those reliefs which the Revenue Divisional Officer could grant, the suit would not be maintainable. That is how we have to understand and reconcile section 6 and the decisions rendered under section 6-A where it directed the suit to be disposed of on merits. Since in this case on the finding that the tenant-defendant is in arrears of rent, the suit itself is not liable to be transferred to the Revenue Court under section 6-A. But the suit in so far as it related to the prayer for eviction is liable to be dismissed on the ground that section 6 of the Act is a bar for granting a decree for eviction.

9. The learned counsel for the plaintiffs contends that the suit could be dealt as one for arrears of rent alone without a decree for eviction and that the plaintiffs could be given a decree for arrears of rent for three years prior to the suit. The learned counsel is well-founded in this contention. He further contended that in view of the termination of the tenancy by notice under Exhibit A-2, the plaintiffs are entitled to claim damages at a higher figure than what is provided under the lease deed. I am unable to agree with the learned counsel that the plaintiffs are entitled to higher rent. Under Exhibit A-2 dated 27th June, 1966, the plaintiffs purported to terminate the lease of the defendant by giving 15 days notice. An agricultural lease, under section 106 of the Transfer of Property Act, could be terminated only by six months' notice. Notice of termination was, therefore, not proper and valid. Accordingly, the plaintiffs are entitled to claim only the rent and not damages for use and occupation. Alternatively, the learned counsel contended that even if the termination of the lease is not valid, the plaintiffs are entitled to reasonable rent. I am unable to agree with this contention either. Only in a case where the lessee has put the land for any use other than that for which it was leased, the lessor would be entitled to claim reasonable rent. But in a case where it was not the case of the landlord that the lessee has put the land for a different use, he is entitled only to the contractual rent. The contractual rent in this case as seen from Exhibit A-2 is Rs. 120 per year. Accordingly, there will be a decree for a sum of Rs. 360 towards past rent. Subject to the payment of the Court-fees, the plaintiffs will also be entitled to the rent at the rate of Rs. 120 per year from the date of suit till date of decree.

10. The second appeal is accordingly allowed. The judgment and decree of the lower appellate Court are set aside. The suit for eviction is dismissed, and the prayer for recovery of arrears of rent and future rent as stated above is granted to the extent mentioned above. There will be no order as to costs.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

A. M. P. S. Muthuswamy .. *Petitioner**

v.

Revenue Divisional Officer, Nagapattinam and others .. *Respondents.*

(A) *Constitution of India* (1950), *Article 226 — Arbitration — Award unstamped — Impounded and sent to Revenue Authorities for levying stamp duty and penalty—Inaction and inordinate delay of revenue authorities—Original award lost—Copy sent — Petition seeking* mandamus *or any other writ or direction to direct respondent to determine stamp duty on impounded award and forward the same to Court—Direction issued.*

(B) *Tamil Nadu Stamp Manual, section* 38 *—Note thereunder—Applicability.*

An unstamped and unregistered award made by arbitrators relating to partition of joint family properties was impunded by the District Court on production before it and sent to the Revenue Authorities for levy of proper stamp fee. After several reminders the latter stated that the award had been misplaced and requested that a copy of the award may be sent. This was done. In 1974 the writ petitioner was informed that certain clarifications were awaited. In that state of affairs the petitioner filed the present writ petition seeking a *mandamus* or any other writ or direction to direct the respondents to levy stamp duty on the impounded document and forward the same to the Court. In the counter-affidavit filed by the Revenue Authorities it was stated that the original award was lost in 1966 and no levy of stamp duty on a copy of the award was permissible.

Held: The view of the Revenue Authorities is neither proper nor correct. In the Tamil Nadu Stamp Manual at the end of section 38 there is a note referring to the proceedings No. 1473, dated 7th June, 1882 of the Board of Revenue stating that "in the case of an instrument impounded by a Judge for want of sufficient stamp and sent to the Collector under section 38, sub-section (2) and lost in transit, held that the Collector may equitably deal with the copy as if it were the original, making a note on the document of the circumstances." The Revenue Divisional Officer should in the circumstances send for the copy of the award once again from the District Judge, treat it as the original and determine the stamp duty payable on it.

The writ petition reveals a shocking state of affairs and depicts in some measure the sorrowful state of things in some offices of the Government. The Indian public are no doubt accustomed to the slow motion of the wheels of Government. But even to members of such a resigned society the facts of this case will give a jolt. It is needless to say that indifferent functioning of Government offices does not fit in with the democratic pattern of Government we have constituted for ourselves. [*Paras.* 1 *and* 9.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Revenue Divisional Officer, Nagapattinam to adjudicate the award dated 1st June, 1959 passed by the Arbitrators, namely, Muthu Vaithilingam Chettiar and Kulandaivelu Chettiar and impounded by the District Court, East Thanjavur in O.S. No. 23 of 1959 on its file and forwarded to him by that Court and return the same to the Court, duly determining the stamp duty, if any, payable.

R. G. Rajan, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondents.

The Court made the following

ORDER.—This writ petition reveals a shocking State of affairs and depicts in some measure the sorrowful state of things in some offices of the Government. The Indian public are no doubt accustomed to the slow motion of the wheels of Government. But even to members of such a resigned Society,

* W.P. No. 2402 of 1974. *3rd August*, 1978.

the facts of this case will give a jolt.

2. Differences of opinion arose between the members of a Hindu joint family and that led to a disruption in the joint family status. A body of arbitrators was constituted to effect a partition of the family properties and give an award in that behalf. The arbitrators gave an award on 1st June, 1959. There was no consensus among the coparceners about the acceptability of the award. That led to some members of the erstwhile joint family filing a suit O.S. No. 23 of 1959 in the District Court, Nagapattinam under section 14 of the Arbitration Act for a direction being issued to the arbitrators to file the award in Court. In response to the notice issued in the suit, the arbitrators produced the original award in Court along with certain documents on 20th January, 1960.

3. The other branch, which was dissatisfied with the award, filed O.P. No. 73 of 1959 before the District Judge under section 33 of the Arbitration Act for setting aside the award. In addition to that, the members of the branch also filed a suit O.S. No. 24 of 1959 for partition of the joint family properties by metes and bounds.

4. The party, which filed O.P. No. 73 of 1959 and O.S. No. 24 of 1959, raised an objection that the award cannot be received and looked into because it had not been registered under section 79 of the Registration Act. The objection was sustained and the District Judge passed an order in favour of the objectors. As against that order, the party which relied upon the award filed a civil revision petition and a civil miscellaneous appeal before this Court. This Court held on 17th April, 1964 that the award cannot be rejected merely because it was unstamped and unregistered and it was open to the District Judge to impound the document and send it for levy of stamp duty and penalty if he considered the document required stamp duty and registration.

5. Even before this Court disposed of the civil revision petition and the civil miscellaneous appeal, the District Judge, in accordance with the view taken by him, impounded the original award and sent it to the Revenue Divisional Officer, Nagapattinam (first respondent) on 16th August, 1960 for levy of stamp duty and penalty. The first respondent returned the document on 26th August, 1962 furnishing the valuation of the properties situated within his jurisdiction. The District Judge retransmitted the award on 4th September, 1962 to the first respondent for levying stamp duty and penalty. Then in the year 1966, the first respondent stated that since the properties lying outside his jurisdiction were also dealt with in the award, he should ascertain the value of those properties from the concerned officers and for that purpose he was sending the document to other officers for valuation report. Thereafter, nothing more was heard for a number of years.

6. Some time in 1974, the District Judge addressed the District Revenue Officer, Thanjavur (second respondent) to find out what had happened to the award sent to the first respondent. By letter dated 9th April, 1974, the second respondent stated that he has addressed the Chief Controlling Revenue Authority for certain clarifications and the orders of the Board of Revenue are awaited. About three months later, the party relying upon the award presented a petition through his Advocate to the second respondent to know about the fate of the award and he was given a reply on 12th July, 1974 that the clarification sought for from the Board of Revenue was still awaited. Then on 29th July, 1974, the second respondent informed the Advocate that the orders of the Board of Revenue have since been received and the first respondent may be approached for further orders. On 1st August, 1974, the first respondent issued a memo. stating that the second respondent had been addressed for certain clarifications and instructions were awaited. It is in that state of affairs, the petitioner came forward with this writ petition seeking a *mandamus* or any other writ or direction to direct the respondents to levy stamp duty and penalty on the impounded document and forward the same to Court.

7. Mr. R. G. Rajan, learned counsel for the petitioner states that on account of the non-levy of stamp duty and penalty on the document, the suit filed in the year 1959 is still pending disposal in the Court of the District Judge and the long delay has caused

untoward hardship and suffering to the parties.

8. The counter-affidavit filed on behalf of the respondents contains a disturbing and distressing story. In paragraph 4, it is stated that:—

> "The files dealing with the collection of stamp duty on the above document from the year 1960 to June, 1964 in the office of the Revenue Divisional Officer, Nagapattinam are not available in his office due to efflux of time. In the year 1966, copies of the unstamped award were forwarded to the Tahsildars of Nagapattinam and Kumbakonam by the Revenue Divisional Officer, Nagapattinam for obtaining the valuation report in his R.C. No. 26844/64-A6 dated 13th February, 1966. The original award had been misplaced subsequently in the Divisional Office and it was not traceable. Hence, the Revenue Divisional Officer, Nagapattinam, addressed the District Judge, Nagapattinam to send a copy of the award for collecting the stamp duty in his R.C. No. 2322/69-A7, dated 19th December, 1969 and 20th May, 1970. Thereupon the District Judge in his letter D. No. 3337 dated 24th June, 1970 sent a copy of the unstamped award to the Revenue Divisional Officer, Nagapattinam. Meanwhile, the required valuation particulars were obtained by the Revenue Divisional Officer from the Tahsildars and from the Executive Engineer, Vennar Division, Thanjavur for collecting the stamp duty. The local Government Pleader, Nagapattinam, and the Government Pleader, Nagapattinam were also addressed by the Revenue Divisional Officer, for giving their opinion for collecting the stamp duty on the copy of the document. They opined that there is no scope for inclusion of a copy of document as an instrument for the purpose of Stamp Act. The second respondent was also addressed by the Revenue Divisional Officer, Nagapattinam to offer his remarks on the admissibility of a copy of the document. He reported that in the absence of the original document, no further action could be taken for levying stamp duty. As there were doubts as to the collection of stamp duty the Board of Revenue (Chief Controlling Revenue Authority) was addressed for decision in the District Revenue Officer's R.C. No. 45313/73-G5, dated 23rd February, 1974 under section 56 (2) of the Stamp Act. The Board of Revenue, in its Ref. LI. 1176/74-1 dated 16th July, 1974 issued instructions that the copy of the unstamped document in question could not be impounded and stamped as if it were the 'original' which was lost in the Sub-Collector's Office, Nagapattinam. Hence, a copy of the unstamped document was not stamped though the particulars of valuation have been gathered".

It is further stated in the counter-affidavit that the Board of Revenue directed the District Revenue Officer to make a diligent search for the missing document and, if it was not traceable, to hold an enquiry and take disciplinary action against the delinquent employee for the loss of the instrument impounded. A clerk by name R. Chinnappan was charged for the loss of the document and was placed under suspension. But further action could not be taken against him because he died on 14th July, 1974. The counter-affidavit ends up with the prayer that since the original award is not available for being levied stamp duty, the writ petition may be dismissed with costs and justice rendered.

9. From what has been stated above it can be seen that there has not only been gross delay in the disposal of the matter, but there has also been callous indifference. Not only has the Revenue Divisional Officer failed to levy stamp duty payable on the document and collect revenue due to Government, but he has not even taken care to keep a valuable original document like an arbitration award, in safe custody. As far as the parties are concerned, the document is an important one and a copy can never supplement the original especially when it is represented in this case that some of the arbitrators have since died, and, as such, the probative value of the document will also be challenged. Be that as it may, the original of the document is said to have been lost in the year 1966. But there has been no action except some correspondence for nearly eight years thereafter. Even at the end of such a long period, the view taken by the respondents cannot be accepted as a proper and correct one. In the Tamil Nadu

Stamp Manual, there is reference to Board's proceedings 1473, dated 7th June, 1882 at the end of section 38. That note reads as follows:—

"In the case of an instrument impounded by a Judge for want of sufficient stamp and sent to the Collector under section 38, sub-section (2), and lost in transit, held that the Collector may equitably deal with the copy as if it were the original, making a note on the document of the circumstances".

It is beyond my comprehension how this proceeding came to escape the notice of the respondents. Having found that the original award had been lost and was not traceable, the only other alternative left open was for the respondents to have acted in accordance with the above-mentioned proceeding and dealt with the copy as if it was the original levied stamp duty. Instead of doing any such thing, the copy has been returned to the District Judge saying that stamp duty cannot be levied on it and the counter-affidavit ends with the mechanical prayer that the writ petition may be dismissed with costs. There is not the slightest trace of regret or apology for the hardship that has been caused to the petitioner by the slackness and negligence in the office of the first respondent resulting in the missing of the original document. It is needless to say that such indifferent functioning of Government Offices does not fit in with the democratic pattern of Government we have constituted for ourselves.

10. The only way to end the impasse is to direct the first respondent to send for the copy of the award once again from the District Judge and to treat it as the original and determine the stamp duty payable on it. However, before determining the amount of stamp duty, the first respondent should give notice to both sides and hear their representations about the valuation determined for the properties dealt with under the award and then pass orders determining the samp duty.

11. The writ petition will stand allowed and a *mandamus* in the nature indicated above will be issued to the respondents. The petitioner will be entitled to his costs as against respondents 1 to 3. Counsel's fee is fixed at Rs. 150.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, CJ.*

V. Vatsala .. *Petitioner**

v.

Official Assignee of Madras representing the Estate of S.V. Namasivayam .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), (as amended by Act XXIII of 1973), section 10 (1)—Scope and applicability—Defence of jus tertii—*Scope.*

Jus tertii is a well known principle in law wherein a person whose rights are sought to be interfered with by another takes umbrage under the rights said to be vested in a third party other than the party opposing him and in certain circumstances, the defence of *jus tertii* is available to the affected party. But in a case like the one under consideration wherein the Act itself is to protect the tenants from unlawful and unreasonable eviction and is not intended to protect the interests of any person other than the tenants, whether the intendment of the Legislature in accordance with the language of the second proviso to section 10 (1) was and is that the denial of title contemplated in the second proviso would also include the invocation of the doctrine of *jus tertii*. Section 10 (1) provides that the tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16, provided that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the Court finds such denial does not involve forfeiture of the lease or that the claim is unfounded.

[*Para.* 6.]

The proviso to section 10 (1) is very clear when it says that the tenant should deny the title of the landlord. It does not say that the tenant can vest the title to the property in his occupation in third parties. This is the concept

* C.R.P. No. 1032 of 1977. *5th October, 1978.*

which is inhered in the principle of *jus tertii*. It is only in cases where the tenant while opposing an application for eviction under the provisions of Act XVIII of 1960 sets up title in himself or herself the second proviso would come into operation and it is in that context alone the Rent Controller would have jurisdiction to find whether the denial of title of the landlord and the setting up of such title in himself or herself by the tenant is *bona fide* or not. It is not open to the tenant to plead, taking advantage of the open language of the second proviso to section 10 (1), that the denial as regards the title of the landlord might even mean and include the vesting of the title to the property in a third party. On the other hand, such denial of title of the landlord would be the resultant of a claiming of title in the property by the tenant herself or himself and not by setting up title in a third party. [*Para.* 7.]

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), praying the High Court to revise the order of the Court of the II Judge, Court of Small Causes, Madras, dated 26th February, 1977 and made in H.R.A.No. 502 of 1976. (H.R.C. No. 1368 of 1975 VII Judge, Small Causes Court, Madras).

P.R. Vasudeva Ayyar, for Petitioner.

K. Shanmugham, P. Murugaiyan and *R.S. Ramalingam,* for Respeondent.

The Court delivered the following

JUDGMENT.—The question that arises in this Civil Revision Petition centres round a legal contention and a factual contention. The petitioner is the tenant who came to occupy a land bearing Municipal Door No. 109-D/6-A Mount Road, Madras. She was admittedly inducted into possession of such land along with the machinery embedded thereto by one Namasivayam. This was under the lease deed Exhibit P-1, dated 14th January, 1972. Everything went on alright until one Thandavan laid title to the machinery denied by Namasivayam. The leasehold interest as recognised by the tenant and which vested in Namasivayam was undisturbed till about July, 1972. On 27th July, 1972, it appears that one Jagadisan claiming a permanent title to the property in question as the purchaser of Door No. 109-D. 6, Mount Road called upon the tenant-petitioner to attorn the tenancy to him under threat of Civil and Criminal Proceedings if his demand was not conceded to. It appears that the tenant afraid of such threats extended by Jagadisan attorned tenancy to him, notwithstanding the fact that she was inducted into the property and the machinery was put into her custody by Namasivayam, and thereafter she was paying the rents to Jagadisan without reference to Namasivayam. She brought to the notice of Namasivayam the above threats of Jagadisan and sought for a return of the advance which she paid under Exihibit P. 1 at the time when Namasivayam let her into possession of the suit property Door No. 109-D/6-A including the machinery therein. There was no reply by Namasivayam. Thereafter, it appears that Namasivayam terminated the tenancy of the petitioner under Exhibit P-6 and called upon the petitioner to vacate. The petitioner replied to Namasivayam stating that it was Jagadisan who is entitled to the property and since she had already attorned the tenancy in favour of Jagadisan, she was not obliged to comply with the notice of termination of tenancy or with the demand for vacating of the premises as claimed by Namasivayam in Exhibit P-6. By that time Namasivayam became an insolvent and his assets vested in the Official Assignee, under the Presidency Towns Insolvency Act, The Official Assignee for and on behalf of the body of creditors continued the action proposed by Namasivayam under Exhibit P-6 and instituted the present petition under section 10(2) (*i*) and 10 (2) (*vii*) of Tamil Nadu Act XVIII of 1960. The Official Assignee's case was that there was wilful default in the payment of the rents due and payable by the tenant-petitioner in respect of her occupation of premises No. 109-D/6-A and she was liable to be evicted since she set up a hostile title in some third party in respect of the premises in question.

2. The defence was that the property belonged to Jagadisan and the Official Assignee as the successor-in-interest and the representative of the body of creditors of Namasivayam cannot institute the present action and seek for eviction.

3. In the course of the hearing of the Rent Control Petition, Jagadisan was examined. He was not made party to these proceedings. The petitioner did not seek for impleading of Jagadisan as a party notwithstanding the

fact that she was shedding so much copious tears which were probably crocodile tears for Jagadisan. She, however chose to examine him on her side. Naturally, Jagadisan relying upon the sale deed Exhibit P-10 under which he is said to have purchased the property claimed that Namasivayam at no time had any interest in the suit land in question and supported the claim of the petitioner to continue in occupation of the suit premises as his own tenant. The Rent Controller accepted the defence of the tenant as a *bona fide* one and, therefore, dismissed the petition for eviction filed by the Official Assignee.

4. On appeal before the Appellate Authority, the latter came to a different conclusion and granted the eviction. It is as against the grant made by the appellate authority that the present revision petition has been filed.

5. The learned counsel for the petitioner strenuously contended that the defence of the petitioner-tenant was *bona fide* within the meaning of the second proviso to section 10 (1) of Act XVIII of 1960 (Tamil Nadu Buildings (Lease and Rent Control) Act, 1960) and that the evidence of Jagadisan has established factually beyond doubt that the suit premises did never belong to Namasivayam and, therefore, the Official Assignee as his successor-in-interest cannot claim any interest thereby.

6. Before going into the merits whether Jagadisan could be said to have any interest at any time in the property in question, let us consider whether the defence of the tenant in question could be said to be one which is available to such tenants under the second proviso to section 10 (1). *Jus tertii* is a well-known principle in law wherein a person whose rights are sought to be interfered with by another takes unbrage under the rights said to be vested in a third party other than the party opposing him and in certain circumstances, the defence of *jus tertii* is available to the affected party. But in a case like the one under consideration wherein the Act itself is to protect the tenants from unlawful and unreasonable eviction and is not intended to protect the interests of persons other than the tenants, whether the intendment of the Legislature in accordance with the language of second proviso, to section 10 (1) was and is that the denial of title contemplated in the second proviso would also include the invocation of the doctrine of *jus tertii*. Section 10 (1) provides that the tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16, provided that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction or any of the grounds mentioned in the said sections, notwithstanding that the Court finds such denial does not involve forfeiture of the lease or that the claim is unfounded.

7. It, therefore, follows that if the finding of the Rent Controller is that the denial is not *bona fide*, then the Controller would be entitled to pass an order for eviction. The question that arises in the instant case is whether such a denial as contemplated under the second proviso to section 10 (1) has arisen. The proviso is very clear when it says that the tenant should deny the title of the landlord. It does not say that the tenant can vest the title to the property in his occupation inhered parties. This is the concept which is incurred in the principle of *jus tertii*. It is only in cases where the tenant while opposing an application for eviction under the provisions of Act XVIII of 1960 sets up title in himself or herself the second proviso would come into operation and it is in that context alone the Rent Controller would have jurisdiction to find whether the denial of title of the landlord and the setting up of such title in himself or herself by the tenant is *bona fide* or not. I am of the view that it is not open to the tenant to plead, taking advantage of the open language of the second proviso to section 10(1) that the denial as regards the title of the landlord might even mean and include the vesting of the title to the property in a third party. On the other hand, I am of the view that such denial of title of the landlord would be the resultant of a claiming of title in the property by the tenant herself or himself and not by setting up title in a third party. That is not the case here. What is attempted by the tenant is that one Jagadisan claims title to the property having purchased premises No. 109-D/6 under Exhibit P-6 and that as he is threatening her civilly and criminally to take proceedings against her if she fails to attorn to him, she was compelled to so attorn the tenancy in favour of Jagadisan ignoring Namasivayam who admittedly inducted her

into possession of the property in January, 1972, under a written instrument of lease. Excepting for the fact that Jagadisan tried to help the tenant-petitioner by getting into the box and pleading his title to the property, he is said to have not even corresponded with the Official Assignee who is a public Officer functioning under the statute about his alleged title in the suit property. In fact, I querried the learned counsel appearing for the Official Assignee whether Jagadisan at any time wrote to the office of the Official Assignee claiming such interest either as a whole or in part over the property in question; but the answer was in the negative. Therefore, the part played by Jagadisan in the proceedings was very limited, in the sense, that he only assisted the petitioner-tenant, and came forward as her witness, and produced no deed and said that he was the owner of the property bearing Door No. 109-D/6. As would be seen hereafter, there is considerable doubt whether the property bearing Municipal Door No. 109-D/6 is the same as the property beaing Door No. 109-D/ 6-A. Even apart from this, the title of Jagadisan cannot be adjudicated finally in a summary proceeding arising under Act XVIII of 1960. The tenant-petitioner can only set up the title in herself or in the alternative claim rights of permanent tenancy, as a result of which she can deny the title of the landlord to the property in question. But under the pretence of setting up of title in herself or in the alternative setting up of a claim of right of permanent tenancy in the property in question, the tenant cannot, in my view, invoke the doctrine of *jus tertii* and vest title in third parties and yet plead that she is *bona fide* denying the title of the landlord to the property in question. In my view, therefore, the Appellate authority was right when it said tha the denial by the tenant, in the circumstances of the case, is not a *bona fide* one.

8. Even on the merits, there is a doubt whether the property purchased by Jagadisan under Exhibit P-10 which obviously relates to permises bearing Door No.109-D/6 is the same as the suit property bearing Municipal Door. No. 109-D/6-A. It is for the parties to establish in appropriate litigation before the appropriate Court as to who owns which property. It is not, however, open to the petitioner as tenant to deny the title of a public officer who succeeded Namasivayam and who let in the petitioner into possession admittedy in the year 1972. There being no other error or jurisdiction or any irregularity in the order, the Civil Revision Petition is dismissed.

9. But in view of the fact that the petitioner has been driven from pillar to post to fight this litigation for Jagadisan in order to subserve her own interests. I feel that she should be given at least six months' time to vacate the premises. Accordingly, the peitioner is granted six months' time to vacate.

R.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Shantilal Paramshankar Joshi, Sole Prop., M/s. Espee and Co., Madras-1. .. *Appellant**

v.

M/s. Themis Distributors (P.) Limited, Madras and another .. *Respondents.*

and

Shantilal Paramshankar Joshi, Sole Prop., M/s. Espee and Co., Madras-1 .. *Appellant*

v.

M/s. Fairdeal Corporation (P.) Limited, Madras and others .. *Respoddents.*

and

The Fairdeal Corporation (P.) Limited .. *Appellant*

v.

Shantilal Paramshankar Joshi, Sole Prop., M/s. Espee and Co., Madras-1 .. *Respondent.*

(A) *Patents and Designs Act* (*II of* 1911)—*Infringement of patent—Suit for damages by inventor—Alternative relief of damages based on actual profits asked for—Grant of alternative prayer only—Appeal by plaintiff—Right to re-elect and seek another relief distinct and different from the alternative relief asked for and granted by the Trial Court negatived.*

(B) *High Court Fees Rules, Order* 5, *rules* 11 *and* 16—*Fee certificate by counsel at first instance for lesser amount—Higher fees fixed by the Court—Whether correct.*

In so far as the claim for damages arising in consequence of an infringement of a patent

*O.S. A. Nos. 51 and 53 of 1975 and 82 of 1976 and C.M.P. Nos. 7130, 7131, 7662, 7663 and 7664 of 1977 and Memo. of Cross-objections in O.S.A.Nos. 51 and 53 of 1975.
2nd August, 1977

is concerned, it appears that the plaintiff in such actions has a right to elect, and even in such election a peculiarity is demonstrable and is seen. The plaintiff can, in such cases, rest content himself by claiming damages for the alleged infringement. He or she need not make the election at that point of time when the *lis* is brought to Court. After being successful in establishing that there has been an infringement of the patent, he or she could either elect and seek the assistance of Court for the grant of damages on the ground that the plaintiff had suffered loss by reason of the wrongful infringement of the patent and therefore privileged to get all such reasonable compensation therefor from the infringement or in the alternative ask for an account of the profits gained by the wrongful user of such patent by the infringers. This position appears to be a very peculiar position available to the plaintiff seeking damages in a patent action.

[*Para.* 10.]

The appellant in the present case as plaintiff sought for such relief in the alternative. He got one such relief asked for by him. That was a relief which was on a par with the other relief asked for by him. He cannot therefore, be allowed at the appellate stage to re-elect and seek for another relief distinct and different from the alternative relief asked for by him and granted by the trial Court. [*Para.* 13.]

Held, that the order fixing higher fees to counsel who argued the case was correct.

Cases referred to :—

The United Horse-Shoe and Nail Company Limited v. *John Stewart and Company*, 13 A.C. 401; *Sakku Bai Ammal* v. *Babu Reddiar*, 90 L.W. 110: I.L.R. (1976) 2 Mad. 317 : (1977) 1 M.L.J. 311 : A.I.R. 1977 Mad. 223.

Appeals and the Memorandum of Cross objections under clause 15 of Patent against the Judgment of the Hon'ble Mr. Justice Paul, dated 25th March, 1974 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. Nos. 167 of 1971 and 67 of 1969 and dated 24th March, 1976 respectively.

C.M.P. Nos. 7130, 7131, 7662 *and* 7664 *of* 1977 : Petitions presented (*i*) to condone the dela in paying the deficit court-fee of Rs. 25 in memo. of cross-objections S.R. No. 69700 of 1975 in the said appeal O.S.A. No. 51 of 1975; (*ii*) to condone the delay of 2 months and 9 days in re-presenting the said S.R. No. 69700 of 1975: (*iii*) the delay in re-presenting the memo. of cross objection S.R. No. 67286 of 1975 in the said O.S.A. No. 53 of 1975; (*iv*) to condone the delay in re-presenting the said S.R. No. 67286 of 1975 : and (*v*) to condone the delay in paying the deficit court-fee of Rs. 25 in the said S.R. No. 67286 of 1975.

Keshavlal Tanvady and *Bakula*, for Appellant.

A.L. Somayaji for *Aiyar* and *Dolia* and *B.T. Seshadri*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Four suits were tried together by Paul, J., and a common judgment was rendered. The plaintiff is the sole proprietor of Messrs. Espee and Company and he is the common plaintiff in all the suits. The defendants, however, are different. In this Judgment, we are concerned with C.S. Nos. 67 of 1969 and 167 of 1971 against which the plaintiff has preferred O.S.A. Nos 53 of 1975 and 51 of 1975 respectively. In O.S.A. No. 82 of 1976 the aggrieved defendants have filed a separate appeal against the grant of special costs by the trial Judge in C.S. No. 67 of 1969.

2. The relevant facts to appreciate the scope of these three appeals, can be summarised thus : The plaintiff claims to be an inventor of a patent and a device as the sole proprietor of Messrs. Espee and Company and one such patent discovered by him relates to combined closure and dropper for bottles and like containers of liquid. He secured the necessary statutory sanction to claim rights as patents having obtained the same from the Controller of Patents and Designs, under the Indian Patents and Designs Act of 1971 which was then in force and it is common ground that he has obtained a certificate evidencing such entitlement in him. The invention claimed by the plaintiff, as set out by the learned Judge in his judgment relating to this specification, is as follows :

> "1. A combined closure and dropper for a bottle or like container for liquids which consists of flexible cap or the like with a hollow chamber and provided with a spout projecting laterally from the body part of the said cap, the said spout having a capillary hole leading from the hollow chamber to the outside the arrangement being such

that when the cap is fitted to the neck of the bottle containing a liquid, the liquid is dispensed through the spout in desired quantities by pressing the cap.

2. A combined closure and dropper according to claim-1 in which the said spout is integral with the body part of the flexible cap or the like.

3. A combined closure and dropper according to claim-1 in which the said spout is formed integrally with a ring of elastic material which is fitted in a groove formed around the body part of the cap or the like, the arrangement being such that when the cap is fitted to the bottle with the hole in the spout aligned with a hole provided in the said groove and leading to the said hollow chamber, the liquid is discharged by pressing the cap.

4. A combined closure and dropper for liquid-containing bottles according to claim-1 characteristic in that the said spout is constituted by one arm or a bent tube projecting outwardly through the cap, the other arm of the said tube being arranged to extend downwardly into the bottle below the level of the said liquid and very near the bottom of the bottle when the cap is fitted to the neck of the bottle or the like, so that the liquid is discharged by pressing the cap without tilting the bottle or the like.

5. A combined closure and dropper according to any of the preceding claims substantially as described and illustrated with reference to Figures 1 to 15 of the accompanying drawings."

3. While thus being vested with a right to have a monopoly in the matter of the patent and the articles manufactured under it, the plaintiff's case is that the first defendant in C.S. No. 67 of 1969 began using the said device *viz.*, the combined closure and dropper device and the second and third defendants aided him in manufacturing the same. In C.S. No. 167 of 1971 the case of the plaintiff is that during one of his visits to his native place at Rajkot he was informed of the availability of such closures and droppers in the free market and on enquiry he found that the defendants were amongst the infringers of the patent, and therefore he came to Court for the reliefs asked for by him in the plaint instituted for the purpose both against the defendants in O.S. No. 67 of 1969 and C.S. No. 167 of 1971. In the plaint, the plaintiff claimed that the defendants were liable to pay damages for the infringement of the plaintiff's patent and that the measure of damages should ordinarily be the loss sustained by him due to the reduction of prices of plaintiff's goods necessitated by the competition of the defendants in the infringing droppers. He would also lay his claim on the fact that his true and first invention to which he is exclusively entitled has been adapted without a licence from him by the defendants. In the alternative the plaintiff also sought for the following relief; in that he submits that the defendants are in the alternative liable to render an account of the manufacture and/or sale and/or use by them and the profits earned and realised therefrom during the time when the plaintiff had the right and monopoly to exploit the patent, and has sought for such damages in the alternative from 26th September, 1955. The prayers sought for by the plaintiff may also be set out to fully understand the scope of the case.

4. In paragraph 15 of the plaint, the plaintiff prayed for judgment and decree as follows :

"(*a*) for an account of profits earned by the defendants or loss suffered by the plaintiff by manufacturing and/or selling and/or using since the defendants commenced infringement thereof; during the patent period of such profits by the defendants or loss suffered by the plaintiff by ordering payment of such sums as the Hon'ble Court may deem just in the alternative;

(*b*) for directing the defendants to deliver to the plaintiff or surrender to an officer of this Hon'ble Court the entire stock of the infringing goods, together with the dyes, and other implements used for manufacture of the same and also publicity materials, such as cartoons, blocks, stencils, price-lists, show cards etc., relating to infringing goods for the purpose of destruction of the same;

(*c*) for the appointment of a Commissioner for the purpose of taking inventory of all the stocks of the infringing goods, of the dyes and other implements used in the manufacture of the same, and of publicity materials, such as blocks, stencils, cartoons, price-lists, ledgers and journals, cash books and such other books and bill books and invoice books ;

(*d*) for costs of this suit ; and

(*e*) for such further or other reliefs as thi Hon'ble Court may deem fit and the nature of the case may require."

The parties went to trial after the defendants filed a written statement denying their liability to account to the plaintiff and *inter alia* claimed that the plaintiff did not secure any patent right over the alleged article in question.

6. The learned Judge framed the following issues in C. S. No. 67 of 1969.

1. Whether the plaintiff is the true and first inventor of "combined closure and dropper" as set out in the claims annexed to the Patent Grant No. 55471?

2. Whether the plaintiff's patent is not valid for all or any of the reasons alleged by the defendants?

3. Whether the plaintiff's patent was commonly known and publicly used as alleged by the defendants?

4. Whether the defendants have infringed the plaintiff's patent is any manner?

5. Whether the alleged infringement, even if true was innocent without any intention to make wrongful gain, as alleged by the first defendant?

6. To what relief is the plaintiff entitled? In O. S. No. 167 of 1971, the following issues were framed :

1. Whether the plaintiff's patent is valid?

2. Whether the defendants have infringed the plaintiff's patent?

3. To what relief the parties are entitled?

7. The learned Judge found after an elaborate trial and after looking into the oral and documentary evidence, that the plaintiff was the true and first inventor of the product and that the patent claimed by the plaintiff was already known in India. On a comparison of the material objects placed before him. *viz*., the one invented by the plaintiff and the other marketed by the defendants, the learned Judge was of the view that they are exactly similar and that the defendant's product did infringe the plaintiff's invention. He also found that those other than the manufacturers of the device having distributed the device or marketed the same along with their medicinal preparations should also be deemed to have infringed the plaintiff's patent. In the net analysis he gave a decree in C. S. No. 67 of 1969 and C. S. No. 167 of 1971 in favour of the plaintiff, entitling the plaintiff to the profits made by the defendants in regard to the infringing articles which would be ascertained by a Commissioner to be appointed for that purpose on the basis already indicated and directing that on the plaintiff paying the court-fee due on that ascertained amount there would be a decree declaring the validity of the plaintiff's patent. The matter was again posted, after delivery of the judgment, for certain clarifications. Once again the learned Judge on 8th April, 1974, after having pronounced the main judgment on 25th March, 1974 came to the conclusion that he did exercise his discretion in having accepted the alternative claim for damages claimed by the plaintiff and that no more argument was still open to the plaintiff in that behalf. The decree passed in C. S. No. 167 of 1971 is similar to the one passed in C. S. No. 67 of 1969 except for the differences with regard to the details relating to the claims in the said suits. Therefore the decree in C. S. No. 67 of 1969 that was drafted in this case may be extracted for ready reference:

"It is declared, ordered and decreed as follows .—

1. That the plaintiff's patent No. 55471 of 26th September, 1955 is valid and that the aforesaid patent is not liable to be revoked.

2. That the defendants herein do render an account of their profits earned by them by manufacture and or sale and or use since they commenced infringement to the plaintiff's patent as aforesaid and those profits shall be awarded to the plaintiff herein.

3. That for the aforesaid purpose a Commissioner shall be appointed for taking accounts as to how many stoppers were distributed by the first defendant after purchasing the said stoppers from defendants 2 and 3 herein along with his medicine and what was the profit made by the defendants 2 and 3 herein in respect of them when they were sold to the first defendant and what was the profit made by the first defendant as ascertained from the price of those stoppers, which was included in the price of the medicine sold by the first defendant, so that the difference between the price at which the

first defendant purchased those stoppers from defendants 2 and 3 and the price which the first defendant charged for the stopper when he included that price along with the price of the medicine, shall represent the profit which the first defendant has obtained and that profit shall also be awarded to the plaintiff herein.

4. That if it is found by the Commissioner that the first defendant herein had merely included in the price of the medicine the price for which the first defendant purchased the stoppers from defendants 2 and 3 herein, then the said first defendant shall not have obtained any profits and that in such a case, the profit obtained by defendants 2 and 3 in selling these stoppers to the first defendant shall be ascertained by the said Commissioner from their accounts in respect of the actual number of stoppers that have been distributed by the first defendant from the year 1968 and that that profit shall be awarded to the said plaintiff to be paid by the defendants jointly or severally subject to the plaintiff herein paying the court fee due on the amount so ascertained by the aforesaid Commissioner.

5. That the defendants herein do pay to the plaintiff herein the costs of this suit when taxed and noted in the margin hereof."

It is as against the above judgment and decrees that the present appeals have been filed.

8. The main contention of Miss. Bakula, learned counsel for the appellant, is that the learned Judge ought not to have accepted only the alternative relief for damages based on the profits made by the defendants, but ought to have granted compensation to the appellant on the basis of the loss suffered by him due to the admitted infringement of the patent. This is the main contention of the learned counsel for the appellant in both the appeals. We shall expatiate it later.

In O.S.A. No. 53 of 1975, filed against the judgment in C.S. No. 67 of 1969 the respondents have taken out three applications. C.M.P. No. 7663 of 1977 is for excusing the delay in the presentation of the cross objections filed in O.S.A. No. 53 of 1975. C.M.P. No. 7662 of 1977 is a similar application for excusing the delay in re-presentation. C.M.P. No. 7664 of 1977 is to condone the delay in paying the deficit court-fee in the matter of the presentation of the objections. The delay in this case is about 1 year 10 months. Similarly, in O.S.A. No.51 of 1975, two applications have been filed. C.M.P. No. 7131 of 1977 is for excusing the delay in re-presenting the cross-objections sought to be filed in this appeal and C.M.P. No. 7130 of 1977 is for excusing the delay in paying the deficit court fee on the cross objections, the delay being 1 year and 9 months. We shall consider these applications at the end of our judgment.

9. The first point raised by the learned counsel for the appellant in these appeals is that the learned Judge was not quite correct having regard to the peculiarity of patent law and the damages awardable in such actions, in having limited and circumscribed the right to secure damages on the basis of the alternative prayer sought for by the plaintiff in the suits. Miss Bakula's argument is that under the patent law two rights are available to the patentor who is aggrieved: He can ask for compensation for the loss on injury suffered by him for the illegal and wrongful acts of the infringer of the patent and that is the essential feature of the claim for damgages in a patent action. She would also to some extent concede that it is open to the aggrieved patentor to put the claim for damages in the alternative and seek for an account from the infringing patentee or marketer of such products and on the basis of such an account, claim the profits securedby the group of infringers on such account-taking. But according to the appellant, the option rests with the plaintiff as the inventor of the patent and that such an option to elect one or the other of the methods of reckoning of damages could be exercised even after the pronouncement of the judgment. Reliance is placed upon an observation in Terrell and Shelley on Patents, Tenth Edition, at page 338, and the decision of the House of Lords in *The United Horse-Shoe and Nail Company Limited* v *John Stewart and Company.*[1] The respondent's case is that the pleadings give a clue to the claim of the plaintiff and the plaintiff having sought for such a claim as to damages in the alternative,

1. 13 A.C. H.L. 401.

and having so elected even at the threshold when the plaint was brought to the Court and the Court having accepted the plaintiff's case in so far as it related to the alternative claim, it is not open to the plaintiff once again to elect and go back on the well-known principle of the grant of damages in patent causes wherein the patentor has a right to ask for damages so as to restitute himself to the petition in which he originally was and be compensated with all such losses suffered by him on account of the wrongful infringement of the patent by the infringer.

10. In so far as the claim for damages arising in consequence of an infringement of a patent is concerned, it appears that the plaintiff in such actions has a right to elect and even in such elections a peculiarity is demonstrable and is seen. The plaintiff in such cases can rest content himself by claiming damages for the alleged infringement. He or she need not make the election at that point of time when the *lis* is brought to Court. After being successful in establishing that there has been an infringement of the patent, he or she could either elect and seek the assistance of Court for the grant of damages on the ground that the plaintiff has suffered loss by reason of the wrongful infringement of the patent and therefore privileged to get all such reasonable compensation from the infringers, or in the alternative ask for an account of the profits gained by the wrongful user of such patent by the infringers. This position appears to be a very peculiar position available to the plaintiff seeking damages in a patent action. It is this which the learned authors of Terrell and Shelley on Patent have referred to in the Tenth Edition, at page 338 when they said:

> "A successful plaintiff is entitled to damages in respect of the actual infringement of his patent, or, at his option to an account of profits."

11. In a later paragraph, the authors would say that in such circumstances the plaintiff should be restored by monetary compensation to the position which he would have occupied but for the wrongful acts of the defendant, provided always that such loss as he proves is "the natural and direct consequence of the defendant's acts." The authors have also noticed that the alternative remedy which was available to such a plaintiff was abolished by the Act of 1919 in England, but it has been reintroduced by the Patents Act of 1949. Section 60 of the Patents Act, 1949, says that in an action for infringement of a patent the plaintiff shall be entitled, at his option, to an account of profits in lieu of damages. After having noticed this specific statutory provision, the learned Judge referred to a decision of the House of Lords in *The United Horse Shoe and Nail Company Limited* v. *John Stewart and Company*[1] Strong reliance is placed upon this judgment by Miss Bakula. The learned Law Lords in this case were considering a case which arose in 1888. It is not suggested before us that there was a law relating to patents at or about the time when the House of Lords was considering the relative rights of the owners of patents as against the infringement of the patents and when they have made this observation. "It is to be noted that the profits, or it may be, losses, made by the infringer is not of any relevance in computing the damage caused to the patentee by his infringement." This general observation made at a time when there was no statutory provision is pressed into service by the learned counsel for the appellant. But for section 60 of the English Patents Act 1949, and even the general law as is applied and accepted in India, probably this argument is attractive. But, we cannot brush aside the statutory provision nor in England which provides for an alternative remedy to the owner of the patent who claims damages based on infringment of his patent. He can seek for a monetary compensation based on the actual loss suffered by him, or he can in the alternative ask, as provided in section 60, for an account of the profits which the defendants have made in lieu of such loss or damages suffered by him. In this context, therefore, we are unable to accept the rule of the House of Lords referred to in *United Horse Shoe and Nail Company's case*[1] as of universal application or in any event as a compulsive mandate in the light of the statutory provisions prevailing.

12. Even otherwise, there is another difficulty which the appellant has to surmount. While paraphrasing the plaint and the reliefs asked for, we have seen that the plaintiff did exercise his option and ask in the alternative for damages based on the profits which the infringers could have obtained by making a

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1. 13 A.C. (H.L.) 401.

wrongfully use of the plaintiff's patent. The learned trial Judge exercised his discretion and granted this alternative prayer. We have had occasion to consider the import of such a request by a litigant, under circumstances, though not similar but almost comparable with the case on hand. We observed in *Sakku Bai Ammal* v. *Babu Reddiar alias R. S. Reddiar*[1] as follows:

> "It is therefore, clear to us that as the choice of the reliefs is always with the plaintiff, who is the *dominus litis* in a litigation; he could seek for more than one independent relief or ask for alternative reliefs. If he asks for the last of such reliefs, then he is placing the reliefs so sought for by him on a par with each other and if the Court trying the subject-matter, grants him one relief, then it follows that he has the benefit of the relief and he cannot throw overboard such a benefit with a design or motive or to further his own cause by seeking umbrage in an appellate Court, and ask for the relief not granted to him, which, as already stated, he only asked for in the alternative."

13. The appellant in this case as plaintiff sought for such relief in the alternative. He got one such relief asked for by him. That was a relief which was on a par with the other relief asked for by him. He cannot, therefore, be allowed at the appellate stage to re-elect and seek for another relief distinct and different from the alternative relief asked for by him and granted by the trial Court.

14. One another argument addressed was that the election of such reliefs is always with the inventor of the patent who has suffered damages and therefore such an election could be made at any time. To accept this contention would mean that it would run counter to the ratio which we have dealt with in detail in *Sakkubai Ammal* v. *Babu Reddiar*[1] not only on the ground that the plaintiff was satisfied with the grant of the alternative relief but also on the ground that the Court having exercised its discretion and accepted the alternative relief, it is not open to the appellant now to go back and ask for another relief, *i.e.* alternative to the alternative relief, and press the appeal on that sole ground.

15. As regards the three petitions filed by the second defendant in O.S.A. No.53 of 1975 Mr. Somayajulu, learned counsel for the cross-objector has made it clear before us that the petitioner-cross-objector is not canvassing the correctness of the findings of fact rendered by the Court below and that in the cross-objections he would circumscribe his objection only to the grant of the prayer for the appointment of a Commissioner to look into his account as prayed for by the plaintiff for the determination of the quantum of damages suffered by the plaintiff in accordance with the judgment of the Court below. Having made this position clear, we thought that to excuse the delay in the re-presentation of the cross-objections or to condone the delay in the payment of the deficit court-fee would not matter at all. He made such a submission with regard to the two petitions filed in O.S.A. No.51 of 1975. We accordingly excuse the delay. Whilst, however, excusing the delay and ordering as prayed for the petitions in C.M.P. Nos. 7662 and 7663 of 1977 in O.S.A. No. 53 of 1975 and C.M.P.No. 7131 of 1977 in O.S.A. No. 51 of 1975, we direct the respondent or respondents concerned to pay the deficit court-fee if not already paid within a week from this date, when the delay in payment of the deficit court-fee should be deemed to have been excused. If the deficit court-fee is not paid within a week from this date then the applications C.M.P. Nos. 7664 of 1977 and 7130 of 1977 shall stand automatically dismissed.

16. With the above preface we shall now consider the objections of the cross-objector or cross-objectors. According to them, the learned Judge was wrong in having directed the appointment of a Commissioner. We fail to see any substance in this contention for this reason. Once we come to the conclusion that the plaintiff is entitled to damages and that plaintiff has elected even at the threshold to base his quantum of damages on the profits earned by the defendants in the course of the infringement of the patent as manufacturer or distributor or seller, one fails to see how such damages could be reckoned without a scrutiny of the account books kept by the defendants during the

1. (1977) 1 M.L.J. 311: (1977) 90 L.W. 110 at 114: I.L.R. (1976) 2 Mad. 317 : A.I.R. 1977 Mad. 223.

period of infringement. We have already referred to the principle that the inventor of a patent is entitled to damages in case his patent is infringed and that the measure of damages is ordinarily the loss sustained by him by such wrongful user by others or has to be fixed with reference to the profits gained by the infringers by adaption of a patent invented by another and to which they had no semblance of a right. The only method by which the profits gained by the defendants could be ascertained is by inspection of the account books and for this purpose an officer of the Court has to go into the books of the infringing parties, take an inventory of all the stocks which were with them during the relevant period and thereafter with reasonable precision and on the available materials reckon and assess the profits which the infringers could have gained in their illegal activities. We are, therefore, unable to agree with the learned counsel for the cross-objectors that the direction given by Paul, J., to appoint a Commissioner for the purposes as directed by him. as in any way wrong or incompatible with the facts and circumstances of this case. The memoranda of cross-objections, shall stand dismissed.

17. Having regard to the conclusions above, O.S.A.Nos. 51 and 53 of 1975 shall stand dismissed and there will be no order as to costs.

18. As regards O.S.A. No. 82 of 1976, the only objection of the learned counsel for the appellant is that the learned Judge was wrong in having granted special costs to the counsel who appeared before him in all the suits. The learned Judge fixed the counsel's fee at Rs.2,500 and also expressed that Mr. Tarwady was of great assistance to the Court and that a higher scale of fee under Rule 16 of Order 5 of the High Court-fees Rules was called for. Learned counsel for the appellant in this case says that under Rule 11 of Order 5 of the said Rules. the costs shall be taxed ordinarily in the manner prescribed in the rule preceding Rule 11. But, the counsel concedes that the Court always has the discretion to direct otherwise. In fact Rule 11 itself says : "*Unless the Court otherwise orders* where the Court directs costs on the amount decreed, the costs shall be taxed in the manner prescribed in the last preceding rule." Reliance is placed upon the fee certificate filed by the counsel in the first instance which was much lower than the sum granted as special fees to the counsel by the trial Judge. That only shows that when the counsel filed the fee certificate he honestly filed his certificate showing the exact fee received by him from his client. That does not mean that he is not entitled to a higher fee. When the matter came up before the learned Judge, he appreciated the quality and quantity of services rendered by the counsel and fixed a special fee of Rs. 2,500 which we are not inclined to disturb at this stage. The rule provides for it and the learned trial Judge exercised his discretion in favour of the counsel and taking into consideration these factors we see no reason to interfere with the order of the Court below. Accordingly, O.S.A. No. 82 of 1976 is dismissed. There will be no order as to costs. The plaintiff's counsel would be in order in withdrawing the sum of Rs.2,500 already in Court deposit.

R.S. ——— *Appeals and cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—*G. Ramanujam, J.*

V. Natarajan ... *Petitioner**

v.

Principal District Judge, Madurai .. *Respondent.*

Equitable estoppel—Appointement of copyist in District Munsif's Court—Appointment regularised after temporary service on probation—Realisation later of copyist not possessing minimum qualification —Services terminated without show cause notice—Termination not valid, both for want of notice and also on account of equitable estoppel.

The petitioner was appointed as a copyist in a District Munsif's Court on probation by the Principal District Judge. Subsequently the appointment was regularised on satisfactory completion. of probation Later, after about seven years, it was found that the copyist did not possess the prescribed minimum general educational qualification of 40 per cent. of marks in English in the S.S.L.C. examination. So his services were terminated. The petitioner challenged the termination as made without giving him an opportunity and also pleaded estoppel against the respondent, the Principal District Judge.

Held: Though the normal rule was that the doctrine of estoppel would not be applied against the State in its governmental functions, it can be used in exceptional circumstances where the conduct of the authorities in being remiss or negligent in the application of the rules had caused considerable hardship and injustice to the person who was seriously affected by such negligent conduct. [*Para* 11.]

On the facts and circumstances, of this case, the petitioner was entitled to invoke the plea of equitable estoppel against the respondent and say that, after he had become a regular member of the services, his services could not be terminated merely on the ground that he had not secured 40 per cent. of marks but had acquired only 35 per cent. of marks. In this view the impugned order had to be set aside. [*Para.* 12.]

*W.P. No. 6421 of 1973. *2nd February, 1978.*

Cases referred to:—

Kothainayaki v. *Director of Secondary Education*, (1969) 82 L.W. 91; *Registrar* v *Sundara*, I L.R. (1956) Mad 402: (1956) 1 M.L.J. 25: A.I.R. 1956 Mad. 309; *Jagannathan* v. *District Collector*, (1965) 2 An.W.R. 437: A.I.R. 1966 A.P. 59; *Delhi University* v. *Ashok Kumar*, A.I.R. 1968 Del. 131; *Ramanatha* v. *State of Kerala*, (1973) 2 S.C.C 650: A.I.R. 1973 S.C. 2641; *State of Punjab* v. *Jagadeep Singh*, (1964) 4 S.C.R. 964: A.I.R. 1964 S.C. 521.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the respondent herein dated 28th November, 1973 (12869) terminating the petitioner's service with effect from 15th December, 1973 A.N. and quash the same.

M. Miranda, for Petitioner.

C. Chinnaswami, for the Government Pleader on behalf of Respondent.

The Court made the following.

ORDER.—The petitioner herein was selected and appointed temporarily as a copyist in the District Munsif's Court, Tirumangalam, by the respondent as per his proceedings dated 14th November, 1966. He was discharged on 10th May, 1967 for want of vacancy. He was again reappointed as a copyist temporarily as per the respondent's proceedings dated 17th June, 1967, from 19th June, 1967. His services from that day onwards has been continuous and the same were regularised by the respondent in his proceedings dated 27th May 1970 with effect from 19th June, 1967. He had been declared to have satisfactorily completed his probation on 19th June, 1967.

2. However by the proceedings dated 28th November, 1973 the petitioner's services were terminated from 15th December, 1973 on the ground that he has not obtained 40 per cent. of marks in English in the S.S.L.C. Examination and that therefore he does not have the minimum general educational qualification as required by the rules. The petitioner has challenged the validity of the said order of termination dated 28th November, 1973 in this writ petition.

3. According to the petitioner he is not a temporary Government servant at the time of the termination of service but a regular member of the service. His services have been regularised with effect from 19th June, 1967 and his probation had also been declared to have been satisfactorily completed on and from 19th June, 1967. After having become a full member of the service, his services cannot be terminated for want of requisite educational qualification. The respondent is estopped from contending that the petitioner has not been properly recruited to the service at this distance of time. The impugned order has also been questioned by the petitioner on the ground that the order terminating his services was passed without giving an opportunity to the petitioner to put forward his case.

4. A perusal of the counter-affidavit in this case indicates that the termination of service of the petitioner from the post of copyist is only for the reason that the post of copyist falls under Clause VI as G O. Ms. No. 4027 (Home) dated 24th November, 1962, that therefore all appointments made for such Clause VI posts on or after 24th November, 1962 must be on the basis of the requisite minimum general educational qualification, that a person who does not obtain 40 per cent. of marks in English in the S.S L.C. examination cannot be said to possess a minimum general educational qualification and that the petitioner not having acquired 40 per cent. of marks in English in the S.S.L.C. examination he cannot be taken to satisfy the educational qualification required for the appointment under Clause VI

5. It appears that the post of copyist was originally in Clause V and the educational qualification required for that post was a mere pass in the S.S.L.C. examination. Only when the post was brought under Clause VI the requirement of minimum of 40 per cent. marks in English was prescribed as a qualification, under rule 19 (2) (*b*) of the Tamil Nadu Judicial Ministerial Service Rules. It is not in dispute that the petitioner did not have the requisite 40 per cent. marks in English in his S.S.L.C. examination and he had obtained only 35 per cent. Therefore, it is possible to say that initially the appointment of the petitioner as a copyist by the respondent in the year 1966 cannot be said to be strictly in accordance with the rules. But, it is not disputed that in making temporary appointments the relaxation of the rules relating to educational qualification is possible. But, in this case though the petitioner was originally appointed temporarily as a copyist he has been appointed on a permanent basis and his services have also been regularised from 1966. He has also been declared to have satisfactorily completed his probation on 19th June, 1969 and thus though the petitioner was originally appointed as a temporary copyist his subsequent confirmation in the post of copyist and the regularisation of his services from 1966 has been done in utter ignorance of the rule 19 (2) (*b*). The question is whether the petitioner's services after he had become a full member of the same could be terminated merely on the basis that he did not get 40 per cent. of marks in English in the S.S.L C. examination. The petitioner has been a full member of the services for a period of seven years. Nobody can dispute the proposition that no appointment can be made to a service in contravention of the rules prescribed for that service. But, where a person has been appointed originally on a temporary basis but subsequently confirmed on a permanent basis after his services had also been regularised, can his services be terminated on the ground that he does not have the requisite qualification at the time of his original appointment and that his appointment was contrary to the rules? According to the petitioner an appointment contrary to the Rules can be cancelled only when the person is acting on a temporary basis not after when he became a regular member of the services. As already stated the petitioner's services have been regularised from 1967 and he has been a member of the services for seven years when the order of termination came to be passed. It is also the petitioner's case that the respondent is estopped from questioning the appointment made by him, on the plea that the petitioner did not have the requisite marks in the S.S.L.C. examination.

6. Apart from the fact that the impugned order of termination of services is vitiated for the reasons that it has been passed without following the principles of natural justice in that the petitioner has not been given any show cause notice why his services should not be terminated before his order of probation was made, the order cannot also be sustained as the respondent is barred by the plea of equitable estoppel in questioning the appointment made by him in going back on his own orders regularising the services of the petitioner from the year 1967 and also declaring completion of his probation in the year 1969.

7. In a similar case, Palaniswamy, J., has observed in *V. P. Thirunavukkarasu* v. *The State of Tamilnadu rep. by District Revenue Officer, Cuddalore*,[1] that it would be most inequitable and unjust to hold that the petitioner cannot hold the post at this late stage of his life and also to treat him as a candidate appointed under rule 10 (*a*) (i) without any right to hold the post. If the authorities concerned, whose duty was to check up the qualifications of the persons who apply for an appointment, and if the authorities concerned who had maintained the service register of the petitioner for a long number of years had done their duty properly by checking the qualifications of the petitioner, it would have been possible for them to have discovered that the petitioner did not possess the minimum general educational qualification, though the service register was prepared wrongly as if he was eligible for service commission. If the petitioner had been told at the earliest opportunity about his lack of qualification he could have taken a decision either to continue in service as a temporary candidate without necessary qualifications or to seek employment elsewhere on a permanent footing or to qualify himself by appearing for the necessary examination. Though the authorities concerned cannot be charged with having done anything positively to the detriment of the petitioner, they by reason of their inaction or silence for a long number of years after the petitioner's entry into service have induced the petitioner to believe that he was qualified to continue in service. In these circumstances, this is eminently a fit case for the application of the doctrine of equitable estoppel, and the order of the respondent cannot be sustained.

8. Ismail J., also took a similar view in *Kothainayaki* v. *Director of Secondary Education Madras*[2] In that case the petitioner was appointed temporarily as a sewing mistress and was considered to possess the minimum general educational qualification though, in fact, she did not possess. She was declared to have satisfactorily completed her probation. But it was discovered that at the time of appointment, she did not possess the requisite qualification and thereupon, an order was passed refixing the salary on the basis of her being an unqualified candidate and cancelling the previous orders sanctioning increments. The petitioner was also asked to be relieved from her duties. The validity of that order was challenged. The learned Judge allowed the petition pointing out that the petitioner did not put forward a claim to a qualification which she did not possess, that the mistake was only on the part of the authority who originally made the appointment and that, in those circumstances the order relieving her from duties was unsustainable.

1. W.P. No. 4108 of 1970.
2. (1969) 82 L.W. 91.

9. The plea of equitable estoppel has been considered by a Division Bench of this Court in *Registrar* v. *Sundara*[1] wherein Rajamannar, C.J., speaking for the Court observed dealing with an order of cancellation of admission of a student on the strength of a wrong endorsement made by the Secondary Education Board, acting presumably on behalf of the University, "the petitioner had expended time and money in pursuing a course of study in the college for nearly two years. He should not now be told that there is a mistake and all the two years of study should go waste......... We would prefer to rest our decision on this ground of equitable estoppel rather than on the ground of unreasonable exercise of power by the University, though ultimately the same result follows ....In our opinion, this is an instance of something much more substantial than what Mr. Venkatasubramania Iyer characterised as sentimental estoppel. It is a case of legal or equitable estoppel which satisfies practically all the conditions embodied in section 115 of the Evidence Act." In W.P. Nos. 3061 and 3487 of 1970, Ramaprasada Rao, J., has also invoked the principle of equitable estoppel and has set aside an order of termination of services under similar circumstances. That was also a case where a person who had already become a member of the services was deprived of his office on the ground that he did not have minimum general educational qualification on the date of his original appointment.

10. The Andhra Pradesh High Court has also taken a similar view in *Jagannathan* v. *District Collector*[2]. In that case a person was allowed to appear in a competitive examination and he came out successful therein. Thereafter he was appointed on

1. I.L.R. (1956) Mad. 402: (1956) 1 M.L.J. 25: A.I.R. 1956 Mad. 309.
2. (1965) 2 An.W.R. 437: A.I.R. 1966 A.P. 59.

probation as typist and his name was included in the list of approved candidates for appointment selected by the Service Commission. After he joined services it was discovered that he was not qualified to sit for the competitive examination and on that ground he was reverted. The validity of the order of reversion was challenged. It was held that the petitioner had become overaged at the time of discharge and that there was no valid justification for depriving him of his service career merely because the authorities happened to be remiss or negligent in, informing themselves correctly at the appropriate time of a matter which related to a period anterior to the petitioner's appointment in Government Service, that therefore they are estopped from reverting the petitioner on the ground that he did not have the requisite qualification at the time of entry in to the services. A Division Bench of the Delhi High Court in *Delhi University* v. *Ashok Kumar*[1] considered the question of equtiable estoppel in an eloborote manner if I can say so with respect. In that case a student was admitted to a course in a college in violation or breach of a clause of the University Ordinance relating to admission to the University Course. After the student had undergone the course for two years his original admission to the course was cancelled. Dealing with the validity of such an order the Court held on the facts of that case the principle of equitable estoppel will clearly come into operation.

11. The learned Government Pleader however contends that there can be no estoppel against a statute, that the statutory rules having prescribed a specific educational qualification for a particular post that cannot be overlooked by the appointing authority, and that the Court cannot compel any authority to sustain an appointment which is admittedly contrary to the rules. The learned Government Pleader cites the decision in *Ramanatha* v. *State of Kerala*[2] wherein the Supreme Court has observed that as a general rule the doctrine of estoppel will not be applied against the State in its governmental public or sovereign capacity and submits that therefore the plea of equitable estoppel cannot be used in the circumstances of this case. But, the same decision has also laid down that an exception to that general rule however arises where it is necessary to prevent fraud or manifest injustice. Thus though the normal rule is that the doctrine of estoppel will not be applied against the State in its governmental functions, it can be used in exceptional circumstances where the conduct of the authorities in being remiss or negligent in the application of the rules has caused considerable hardship and injustice to the person who is seriously affected by such negligent conduct. The learned Government Pleader also referred to the decision in *State of Punjab* v. *Jagadeep Singh*[1] wherein it has been pointed out that a wrong confirmation of a person in a post can always be cancelled if it is contrary to the rules. In that case a person's confirmation was cancelled and an order deconfirming him was passed on the ground that the confirmation was made on the erroneous assumption that a post was available, while it was in fact not available. I do not see how the principle laid down in that case can be applied to deprive the petitioner herein of the benefit of his confirmation and regularisation of services.

12. Admittedy the petitioner's appointment has been regularised. The petitioner has been confirmed and his services has been regularised in the post of copyist by the respondent from 1967 though without closely following the statutory rules and the petitioner had been made a full member of services for well over a period of seven years. His services cannot now be terminated that he did not have the requisite qualification. The rule requiring a particular educational qualification for a post has to be applied at the time when the person enters into service and not at the time when he has been made a permanent member of the services after treating him as duly qualified for the post. It is not in dispute that the rule requiring the minimum of 40 per cent. of marks in English can be relaxed by the Government under general rule 48. In such a case, the petitioner's appointment while he does not have that required qualification can only be treated as irregular and not void. The petitioner was not terminated due to want of vacancy but on the ground that at the time of the original appointment he did not have the requisite educational qualification. In this case the petitioner is not to blame for anything tha thad happened. There was no misrepresentation on his part. He merely applied for the post

1. A.I.R. 1968 Delhi 131.
2. (1973) 2 S.C.C. 650: A.I.R. 1973 S.C. 2641.

1. (1964) 4 S.C.R. 964: A.I.R. 1964 S.C. 521.

and he was selected and later his services had been regularised and confirmed. The entire mistake appears to be with the respondent in regularising the temporary services of the petitioner and also confirming and making him full member of the services in utter ignorance of service rules. For such a negligent conduct on the part of the respondent the petitioner cannot be penalised. I am therefore of the view that on the facts and circumstances of this case the petitioner is entitled to invoke the plea of equitable estoppel against the respondent and say that after he has become a regular member of the services his services cannot be terminated merely on the ground that he had not secured 40 per cent. of marks but has acquired only 35 per cent of marks. In this view the impugned order has to be set aside. The writ petition is allowed and the impugned order is set aside. There will be no order as to costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

M.K.S. Gopalakrishna Chettiar and another .. *Appellants**

v.

N. Sankaramoorthy and others .. *Respondents.*

(A) *Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act, (XXI of 1972), section 3—Scope and applicability—Tenant executing promissory note in favour of landlady's husband—Adjustment of amount towards arrears of rent—Suit on foot of promissory note decreed—Tenant's petition under the Act claiming benefit—Husband not 'landlord' within the meaning of the Act and not entitled to evict.*

(B) *Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), section 2 (e)—'Landlord'—Definition of.*

A close reading of sub-section (1) (*a*) of section 3 of the Tamil Nadu Cultivating Tenant's Arrears of Rent (Relief) Act, 1972 reveals that there are three important conditions for the application of this section: (*i*) arrears of rent, (*ii*) payable by a cultivating tenant to the landlord and (*iii*) outstanding on the 30th June, 1971. In the instant case there were arrears of rent. In fact, the promissory notes themselves contained the recitals that they had come to be executed only towards the arrears of rent due by the tenants to the landlady. The respondents were cultivating tenants. The real question was however, whether the husband, in whose favour the promissory notes had been executed, could be called 'landlord' within the meaning of the sub-section. In this case, no doubt, a power of attorney had been executed in favour of the husband. From that it could not be held that he was entitled to evict because he did so as a agent of the landlady. Therefore it was abundantly clear that there was no relationship of landlord and tenant as between the husband of the landlady and the tenants.

[*Paras*. 8 *and* 9.]

Appeals against the order of the Court of the Subordinate Judge, Kumbakonam dated 1st 1st October 1974 and made in C.M.A. Nos. 81 and 82 of 1972 (E.P. No. 581 of 1972 in O.S. No. 271 of 1967 and E.A. No. 1364 of 1972 in O.S. No. 271 of 1967 on the file of the District Munsif, Kumbakonam.

V. Krishnan for Appellants.

G. Jagadesa Ayyar, for Respondents.

The Court delivered the following

JUDGMENT:—In these cases, the short question that arises for for determination is whether the respondents could claim the benefits of section 3 of the Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act, 1972 (Tamil Nadu Act XXI of 1972). In order to appreciate this issue, the following facts may be noted.

2. The respondents are cultivating tenants under one G. Pattammal, 1st appellant in C.M.S.A. No. 88 of 1975. Her husband, Gopalakrishna Chettiar, was collecting the rents for and on behalf of his wife Pattammal. For the arrears of rent upto the end of fasli 1371, the tenant N. Sankaramoorthy executed a promissory note for a sum of Rs. 600 on 1st May, 1962 in favour of Gopalakrishna Chettiar and for the two subsequent faslis, he executed another promissory note in favour of the same person *viz*., Gopalakrishna Chettiar for a sum of Rs. 850 on 21st March, 1964. The said Gopalakrishna Chettiar filed O.S. No. 271 of 1967 and obtained an *ex parte* decree

*A.A.A. Nos. 87 and 88 of 1975. 26*th July*, 1978.

thereon. Under the provisions of the Tamil Nadu Act XXI of 1972, payments made after 1st July, 1971 were to be credited for the arrears of lease for fasli 1381. The tenants alleged that they had paid Rs. 215 on 23rd September, 1971 and then Rs. 600 on 29th September, 1971 by way of adjusting theamounts due to the petitioners towards the sale price to be paid by the landlady. Then again, by the sale of a pair of bulls worth Rs. 600 that amount had already been adjusted. In the result, what remains to be paid is only Rs. 1,597 and the actual liability as per the provisions of the Tamil Nadu Act XXI of 1972 is only Rs. 823.25. Consequently by the application of section 3 of the said Act, the entire arrears should be deemed to have been wiped off and full satisfaction recorded. On these allegations E.A. No. 1364 of 1972 came to be filed. The landlady contested the applications stating that she did not get the promissory notes in the name of her husband towards the arrears of rent due from the tenants, that she was managing her own affairs independently and passing receipts and that she had no interest in the payment made by the petitioners towards the discharge of the decree amount. The sale transactions referred to by the petitioners have nothing to do with the arrears of rent. She received a sum of Rs. 175 for fasli 1380 on 29th September, 1971. Therefore, the balance is due and hence the application is liable to dismissed.

3. The husband contended that the petitioners were not his tenants and therefore, the provisions of Tamil Nadu Act XXI of 1972 will not apply to the decree rendered on the foot of the promissory notes. Consequently the petition was liable to be dismissed.

4. The Executing Court did not accept the case of the petitioners-tenants and consequently dismissed the application refusing to record full satisfaction. As against the same C.M.A. Nos. 81 of 1972 and 82 of 1972 were preferred which had been allowed by the learned Subordinate Judge of Kumbakonam. Aggrieved against that order, the husband Gopalakrishna Chettiar has preferred C.M.S.A. No. 87 of 1975 while C.M.S.A. No. 88 of 1975 has been preferred by his wife.

5. Mr. V. Krishnan, learned counsel for the appeallants, urges that in order to have the benefit or section 3 of the Tamil Nadu Act XXI of 1972, it must be proved that there is relationship of landlord and cultivating tenantsas between Gopalakrishna Chettiar, the appellant in C.M.S.A. No. 87 of 1975 and the respondents/tenants. In this case, Pattammal, the 1st appellant in C.M.S.A. No. 88 of 1975 alone is the landlady. The fact that the two promissory notes came to be executed in discharge of the arrears of rent due to the wife of Gopalkrishna Chettiar and decree has been obtained on the foot of the promissory notes cannot mean that relationship of landlord and tenants has come to be established between the appellant in C.M.S.A. No. 87 of 1975 (Gopalakrishna Chettiar) and the respondent/ tenants. Consequently, the order is liable to be set aside.

6. As against this, what is pointed out by Mr. G. Jagadeesa Ayyar, learned counsel for the respondents, is that it was the husband who was through out acting on behalf of the wife and in fact had accepted certain payments made on behalf of the wife and Pattammal, landlady herself had been paid certain amounts. Having regard to the relationship between the parties, it must be held that the husband alone is the landlord. Besides, the power of attorney had been executed in favour of the husband which means that he will be entitled to evict the tenants *viz.*, respondents and that is the definition of "landlord" under the Tamil Nadu Cultivating Tenants Protection Act, 1955. Therefore, the orders of the lower appellate Court are unassailable.

7. Having regard to the above argument, I have to necessarily refer to section 3 of the Tamil Nadu Act XXI of 1972. The relevant portion is extracted below:

"3. *Relief in payment of arrears of rent.*—(1) (*a*) All arrears of rent payable by a cultivating tenant to the landlord and outstanding on the 30th June, 1971 (hereinafter referred to as arrears of rent), shall be deemed to be discharged, whether or not a decree or order has been obtained therefor, if such cultivating tenant....

(*i*) has before the date of the publication of this Act paid to the landlord or deposited in the Court or before the competent authority, to the account of the landlord; or

(*ii*) pays or deposits in the manner specified in clause (*b*) within six months from the date of the publication of this Act; or (*iii*) is deemed to have paid or deposited under this Act the whole of the rent due for the fasli year com-

mencing on the 1st July, 1971 and ending with the 30th June, 1972 (hereinafter referred to as the current rent).

8. A close reading of this sub-section reveals that there are three important conditions for the application of this sub-section. (*i*) arrears of rent (*ii*) payable by a cultivating tenant to the landlord and (*iii*) outstanding on the 30th June, 1971. In the instant case, there is no difficulty in holding that there are arrears of rent. In fact, the promissory notes themselves contain the recitals that they had come to be executed only towards the arrears of rent due by the tenants to G. Pattammal, the landlady. It cannot also be gainsaid that the respondents are the cultivating tenants. But the real difficulty arises only when deciding the question whether the husband, in whose favour the promissory notes have been executed, could be called a landlord within the meaning of the above sub-section. The definition of "landlord" as occurring under section 2 (*f*) of the Tamil Nadu Act XXI of 1972 reads as follows:

> "(*f*) "landlord" means a landlord as defined in clause (*e*) of section 2 of the Tenants Protection Act and includes...... (*i*) A public trust as defined in clause (25) of section 2 of the Public Trusts Act; and (*ii*) a landlord as defined in clause (1) of section 3 of the Malabar Tenancy Act."

This takes me on to the Tamil Nadu Cultivating Tenants' Protection Act, 1955. Under that Act, the definition of "landlord" occurs under section 2 (*e*) which run thus:

> "(*e*) 'Landlord' in relation to a holding or part thereof means the person entitled to evict the cultivating tenant from such holding or part";

9. In this case, no doubt, a power of attorney has been executed in favour of the husband. From that it cannot be held that he is entitled to evict because he does so as an agent of the landlady. Therefore, it is abundantly clear that there is no relationship of landlord and tenants as between Gopalakrishna Chettiar, the appellants in C.M.S.A. No. 87 of 1975 and the respondents. Consequently, I have no hesitation in upholding the argument of Mr. V. Krishnan, learned counsel for the appellant. In the result C.M.S.A. No. 88 of 1975 will stand allowed.

10. There is a controversy as to the various payments made in discharge of the liability due from the tenants of respondents. That will be enquired into by the executing Court. For this purpose, I allow C.M.S.A. No. 87 of 1975 and remit the matter to the executing Court for determination of the liability of the tenants. No costs.

R.S. *Order accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*V. Balasubrahmanyan, J.*

Criterion Publicity Private Ltd., carrying on business at No. 19, Woods Road, Madras-2. ... *Appellants* *

v.

Golden Plastics a firm of Merchants by its Partners .. *Respondents.*

Civil Procedure Code (V of 1908), section 20—Jurisdiction—Cause of action one of the determining factors—Plaintiff. private limited company with Head Office at Madras, carrying on business as Advertising Consultants—Defendants, partners of a firm doing business at Bombay—Agreement by plaintiff to do advertisement hoarding for defendants at Bombay—Plaintiff performing his part of the contract—Suit for recovery of unpaid bills filed in City Civil Court, Madras—City Civil Court, Madras whether has jurisdiction.

Section 20 of the Code of Civil Procedure 1908, enacts cause of action as one of the determining factors in fixing the jurisdiction of trial Courts. But this section, as it stands, does not say, in so many words, that the cause of action in suits for recovery of money or in suits based on contracts must be held to arise in part at least at the place where the money was payable or agreed to be paid. All that the section says is, somewhat broadly, that a suit may be filed in a Court within whose jurisdiction the cause of action arises in whole or in part. In the Code of 1882, which the Code of 1908 replaced a similar provision relating to cause of action for suits was treated a little more elaborately, and section 17 of that Code, more or less corresponding to section 20 of the present one, elucidated the provision in an explanatory clause. *Explanation* III to that section made particular

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*A. A. O. No. 535 of 1975. *24th April, 1978*

reference to suits upon contracts, and laid down that the cause of action in such suits may be held to arise either at the place where the contract is concluded, or at the place where parties have agreed to perform it or at at the place where money is payable in performance of the contract. Although there is no similar explanatory provision under section 20 of the present code, courts have tended to accept the principle behind the old *Explanation*. [*Para.* 13.]

What the *Explanation* in the old code said, the principle of which is still regarded as valid, can be regarded as exhaustive of the various places where cause of action may be said to arise even in suits upon contracts. It is quite conceivable that parts of that cause of action may arise in places other than those mentioned in the *Explanation*. At any rate, under the format of section 20 of the present Code, which enacts the provision, it may be a question for decision in every case to find out if the individual facts pleaded and proved therein bring the cause of action within the local limits of the Court in which the suit is instituted. [*Para.* 14]

If the parties residing or carrying on their avocation in different parts of the country find it worth their while to transact business with each other notwithstanding the distances which separate them, they must be prepared to be 'dragged' into distant courts, if that is the right expression to use, when disputes arise which they cannot settle by mutual agreement. To have one's law Court at one's door-steps is not a practicable, or even a desirable goal in the administration of Civil Justice. If, by applying the relevant principles under section 20 of the Code, it is found in a given suit, that part of the cause of action accrued within the jurisdiction of a given Court, the fact that either the one or the other party or, for that matter, both of them, live or carry on business elsewhere can have no relevance to the Court's undoubted jurisdiction to proceed to trial. [*Para.* 22].

Held on facts: Where, though the contract between the parties was orally concluded at Bombay and the performance of the contract by the plaintiff was also at Bombay, it was found that the place of payment to the plaintiff was to be at Madras, both on principle as well as on authority the plaintiff in this case was entitled to file the suit at Madras on the ground, if on no other, that under the contract between the parties, the consideration was payable to the plaintiff at Madras.

Cases referred to:—

Lelang v. *Cooper*, (1964) 2 All. E.R. 929: (1965) 1 Q.B. 232: (1964) 3 W.L.R. 573; *Gaisy and Company* v. *Appalaswami Naidu*, (1946) 1 M.L.J. 11 I.C. 133: A.I.R. 1946 Mad. 300 226; *Venkatachalam Pillai* v. *Rajavalli M. Sajun*, (1935) 68 M.L.J. 504: 41 L.W. 519: A.I.R. 1935 Mad. 663; *C. Satyanarayana* v. *Kanumarlapudi Lakshmi Narasimham* (1967) 1 An.W.R. 445: A.I.R. 1968 A.P. 330; *Tika Ram* v. *Daulat Ram*, I.L.R. (1924) 46 All. 465.

Appeal against the order of the Court of the XII Assistant Judge City Civil Court, Madras dated 30th July, 1975 and made in O. S. No. 7882 of 1972.

V. Narayanaswami, for Appellant.

S. Balasubramanian and *Udairaj Gulakah*, for Respondents.

The Court made the following

ORDER:—This is an appeal from an order of the XII Assistant Judge, City Civil Court, Madras, returning a plaint for presentation before a proper Court.

2. The plaintiff in question is a private limited company having its Head Office at Madras and carrying on business as advertising consultants. The defendants are partners of a firm having their business at Bombay. According to the plaint averments, the plaintiff agreed to do some advertisement hoardings for the defendants at Bombay for consideration. The plaintiff did in fact perform its part of the contract by putting up hoardings in Bombay. The defendants made some payments, but there was a balance payable under four bills issued by the plaintiff for reimbursement of expenses incurred by the plaintiff for and on behalf of the defendants and also for the plaintiff's remuneration for doing the hoarding jobs. The suit was laid for recovery of Rs. 13,566-18, representing the unpaid bills.

3. The suit was resisted by the defendants on more than one ground, but their principal objection was that no part of the cause of action accrued in Madras and hence the suit did not lie in the City Civil Court, Madras.

4. The learned XII Assistant Judge tried this issue as to jurisdiction as a preliminary

issue. At the conclusion of the inquiry, he agreed with the defendants and held that no part of the cause of action arose within the limits of the jurisdiction of the City Civil Court, Madras. Following this determination, the learned judge ordered the plaint to be returned for presentation to the proper Court.

5. The plaintiff has appealed to this Court, Mr. V. Narayanaswami, the plaintiff's learned counsel, submitted that a part at least of the cause of action must be held to have arisen in Madras. He referred to the plaintiff's pleadings as well as the evidence adduced at the trial.

6. Mr. Ram Mohan, learned counsel for the defendants, however, reiterated that the entire cause of action for this suit had accrued only in Bombay.

7. There was some discussion at the bar as to the precise nature of this suit. According to Mr. Narayanaswami, the suit was one by an agent against his principal for money due on accounts. This is, more or less the description given by the XII Assistant Judge in his judgment. Mr. Ram Mohan, however submitted that this suit cannot be regarded as a suit on accounts stated, but is only a money suit, pure and simple.

8. It seems to me that the discussion about the nature of the suit, in the sense of giving it an appropriate label, is not worth while having regard to the context of the present inquiry, which is to find where precisely the cause of actionaccrued or arose. The nature of the suit, or even the form of action, is one thing; the cause of action for the suit is quite another. The two things should not be mixed up: Vide the observations of Diplock, L.J., in *Letang* v. *Cooper.*[1] The nature of the suit may be ascertained or determined by looking at the kind of reliefs asked for in the suit. The cause of action, however, is made up of a number of facts which are necessary to be pleaded and which, if established, would enable the plaintiff to obtain from the Court a remedy against the defendant. It is easy to see that upon the same cause of action, or fact-situation, different remedies may be available to a plaintiff. The question in this case, therefore, is not whether this is a money suit or a suit for accounts. The question is: where did the cause of action for the suit arise?

9. The learned XII Assistant Judge held that the entire cause of action had accrued in Bombay. He came to that conclusion, because, on the evidence, he found two things: (*i*) that the contract between the parties was concluded at Bombay, and (*ii*) that the performance of the contract by the plaintiff was also at Bombay.

10. One may question the learned Judge's conclusion on the issue as to jurisdiction, but one must, on the evidence on record, accept his findings of fact on the two points, namely, place of performance. The contract between the parties in this case was not in writing. But the plaintiff's own accountant admitted in the witness-box that the contract was concluded at Bombay. The evidence of the General Manager of the defendants was also to the same effect. At the material time, the plaintiff had a branch at Bombay, and on the evidence on record, it is, I think, a proper conclusion to hold that the contract was orally concluded at Bombay.

11. As for the place of performance of the contract, the evidence is stronger still. Indeed, there is not dispute that the plaintiff undertook to put up the advertisement hoardings only at Bombay. The plaint averments say so. The plaintiff's accountant gave evidence to the very same effect in the witness box.

12. According to Mr. Ram Mohan, these findings must conclude the issue as to jurisdiction against the plaintiff. He said that it would be quite out of place under the law to file a suit at Madras for enforcing payment under a contract when neither the place of formation of the contract nor the place of performance of the contract was Madras. Mr. Narayanaswami, however, urged that this reasoning, which found favour with the Court below, is faulty, for it misses one vital element, or component, in the bundle of facts which make up the cause of action in this case. He said that the plaintiff had very clearly pleaded in the plaint that under the terms of the contract the place of payment to the plaintiff was to be at Madras. This fact, which, according to him, was amply established by the evidence at the trial, had to

1. (1965) 1 Q.B. 232: (1964) 3 W.L.R. 573: (1964) 2 All. E.R. 929 (C.A.) at pages 934 and 935.

that extent at least, accrued in Madras. Learned counsel complained this aspect of the cause of action in this case, which was raised by the plaintiff both in pleading and in proof, had been completely overlooked by the court below.

13. I think the criticism of Mr. Narayanaswami is justified. For I find no discussion of this aspect in the judgment of the learned judge. I must also agree with the learned counsel's other submission that the place where the money is payable would also tend to fix, in part at least, the place where the cause of action accrues. Section 20 of the Code of Civil Procedure, 1908 enacts cause of action as one of the determining factors in fixing the jurisdiction of trial courts. But this section, as it stands, does not say, in so many words, that the cause of action in suits for recovery of money or in suits based on contracts must be held to arise in part at least at the place where the money was payable or agreed to be paid. All that the section says is, somewhat broadly, that a suit may be filed in a Court within whose jurisdiction the cause of action arises in whole or in part. In the previous Code of 1882, which the Code of 1908 replaced, a similar provision relating to the cause of action for suits was treated a little more elaborately. Section 17 of the Code, more or less corresponding to section 20 of the present one, elucidated the provision in an explanatory clause. *Explanation III* to that section made particular reference to suits upon contracts, and laid down that the cause of action in such suits may be held to arise either at the place where the contract is concluded, or at the place where the parties have agreed to perform it or at the place where money is payable in performance of the contract. Although there is no similar explanatory provision under section 20 of the present Code, courts have tended to accept the principle behind the old explanation. See, for example, the decision of Yahya Ali, J., is *Gaivy and Company* v. *Appalaswami Naidu*[1]

14. It may however be observed that what the *Explanation* in the old Code said, the principle of which is still regarded as valid, can be regarded as exhaustive of the various places where cause of action may be said to arise even in suits upon contracts. It is quite conceivable that parts of the cause of action may arise in places other than those mentioned in the *Explanation*. At any rate, under the format of section 20 of the present Code, which enacts the provision, as I said, in very broad terms, it must be a question for decision in every case to find out if the individual facts pleaded and proved therein bring the cause of action within the local limits of the court in which the suit is instituted. It was, in this sense, and without reference to the guidelines mentioned in the old Code of 1882, that a Full Bench of this Court proceeded to determine the place of accrual of the cause of action in a case reported as *K. E. P. V. Venkatachalam Pillai* v. *Rajaralli M. Sajun*[1] The suit in question before the Full Bench was a suit on a contract for sale of goods. The plaintiff was the purchaser. The defendant was carrying on business in Rangoon. The plaintiff instituted the suit in the District Munsif's Court, Tuticorin. The relief claimed was payment of damages for short-fall in delivery as well as for sub-standard supply. There was some question in that suit as to whether the defendant was the seller of the goods or whether he was merely a commission agent. But, on the evidence, it was plain that the parties had agreed that payment for the goods should be made by the plaintiff at Tuticorin Dealing with this aspect of the case. Beasley, C. J. speaking for the Full Bench, observed as under:—

> "......whatever the relationship between the parties may in fact be, payment for the goods purchased by the plaintiff or on his behalf was to be made at Tuticorin. If that is so, part of the cause of action arose within the jurisdiction of the Tuticorin District Munsif's Court".

On principle as well as on authority, therefore I am satisfied that the plaintiff in this case was entitled to file the suit at Madras on the ground, if on no other that under the contract between the parties the consideration was payable to the plaintiff at Madras. Learned counsel for the defendants, however, submitted that since the court below had not pertinently addressed itself to this aspect of the cause of action, the matter may be sent back to it for further consideration. I do not feel the need for taking such a course, for, on the materials

1. (1946) 1 M.L.J. 11: 226 I.C. 133: A.I.R. 1949 Mad. 300.

1 (1935) 68 M.L.J. 504: 41 L.W. 519: A.I R. 1935 Mad. 663.

on record the matter can be as, indeed, it has been, dealt with in this very appeal.

15. Mr. Narayanaswami invited my attention to the documentary evidence in the case to show that payment for the hoarding jobs to be performed at Bombay had nevertheless to be made by the defendants only at Madras. He relied on the bills issued by the plaintiff to the defendents. These bills had been referred to in the plaint and marked at the trial as exhibits. The bills are in printed form. At the foot of every bill are to be found printed certain terms and conditions. Clause 3 is in the following terms:

> "All claims and disputes arising out of this bill are to be settled and moneys payable under such settlement, paid in Madras....".

16. Mr. Narayanaswami also drew my attention to the oral evidence in the case. The plaintiff's accountant, adverting to this aspect of the course of dealings between the parties, testified that the plaintiff's head office at Madras prepared the bills and sent them to the defendants. Statements of account were also similarly prepared and sent from Madras. The accountant's further evidence was that the defendant made the payments of the bills at Madras and not at Bombay, excepting on some occasions. The general manager of the defendants admitted that some cheques were sent by them to Madras, although he insisted that payments were generally made only to the plaintiff's Bombay branch. As to what was the agreement between the parties as to the place where the remuneration for the plaintiff was to be paid, the defendants' manager did not give a direct answer. All he said was that there was nothing in writing to show that the payment should be made in the plaintiff's branch office at Bombay. When his attention was pertinently drawn to the plaintiff's bills and the conditions they contained, the defendants' manager gave conflicting answers, thus:

> "I am aware of the terms and conditions of the bill. I am not aware of the terms of the bill".

In this state of evidence, it seems to me to be reasonable to regard the foot-notes in the plaintiff's printed bills as providing more or less contemporaneous records in writing of the terms of the contract relating to the place of payment.

17. Mr. Ram Mohan urged that the evidence in the case only showed that some payments were made at Bombay and some payments were made at Madras. He urged that since all payments were accepted by the plaintiff, the proper inference was that the place of payment was a matter of indifference to the parties. I cannot accept this argument. For fixing the place where part of the cause of action arises in such a case as this, what is required is to fix the place where money is payable, not where it is paid actually. For the dispute in the suit, quite naturally, is not about money paid, but about money which remains unpaid, although payable. Hence, evidence as to the places of actual payment cannot be an unerring indication as to the relevant term in the contract.

18. Mr. Ram Mohan then urged that the Court should not take note of the conditions printed in the plaintiff's bills as conclusive, or even as indicative, of the terms of the contract between the parties relating to the place of payment. He pointed out that bills happen to be issued, not at the time of the formation of the contract, but at the time of, or even subsequent to, the performance of the terms of the contract. He further submitted that, in any case, there was no evidence on record to show that the conditions in the plaintiff's bills were accepted by the defendants. Learned counsel, accordingly, urged that the printed condition in the bills fixing the place of payment cannot be regarded as part of the binding contract between the parties.

19. I must reject these arguments as unsound. The foot notes carried by the bills are not to be regarded as themselves containing the terms of the contract as respects the place of payment. On the contrary, they are, and are being relied on by the plaintiff, only as furnishing a near-contemporaneous evidence in writing as to what the parties had agreed between themselves even at the time of conclusion of the contract. It is common ground that the plaintiff and the defendants did not draw up the terms of the contract in writing. The whole thing was based on oral understanding. Evidence as to what were the terms of the oral contract need not always or necessarily be oral. There can be evidence in writing of oral contracts, as often happens when one party sends to the other a written record, or memorandum, of what was earlier orally agreed between them. The footnotes in the plaintiff's bills have precisely this role and no more. It is worthwhile mentioning that the defendants did not ever raise any protest against the conditions printed in the bills.

20. Mr. Ram Mohan then submitted that Madras cannot be regarded as the place of payment of the bills, even if one were to go by the language of the foot-note contained therein. According to learned counsel, the words "all claims and disputes arising out of these bills are to be settled and moneys payable under such settlement, paid at Madras", are only applicable to a post-settlement payment following a dispute and a settlement of the dispute between the parties. In my view, the words do not lend themselves to this interpretation alone. The clause refers not only to disputes and settlements and payments under settlements, but also to claims arising out of bills and even to admitted non-payment of bills. The expression "settled" is used in a generic sense to cover both claims and disputes. As I read the condition, an undisputed claim and a claim before any dispute has arisen with reference to it have also to be paid only at Madras.

21. Mr. Ram Mohan referred me to two reported cases on the basis of which he urged me to uphold the decision of the City Civil Court in this case. The first reported case is that of a learned single Judge of the Andhra Pradesh High Court in *C. Satya Narayana and others* v. *Kanumarlapudi Lakshmi Narasimhan*[1]. The view expressed by the learned Judge was that the words written on a letterhead, "subject to Madras jurisdiction cannot become part of a contract, unless there was evidence to show that it was agreed to by the other party. I respectfully agree with this approach to the printed condition in a letter-head, if it were put forward as constituting, the contract, all by itself. But I do not regard the printed condition in the plaintiff's bills in the present case as something which, by its own force, determines conclusively the place of payment. I rely on the printed condition rather as a subsequent piece of evidence near enough in point of time to the conclusion of the contract to show that it was that the parties had, even in the first instance, agreed between themselves as to the place of payment.

22. The other case referred to by Mr. Ram Mohan is *Tika Ram* v. *Daulat Ram*[2], a decision of a Division Bench of the Allahabad High Court. In that case a suit was filed in the Court of the Subordinate Judge of Budaun for recovery of moneys alleged to be due from the defendant on accounts. The defendant was a resident of Bombay. The Court held that, unless the contract clearly indicates the contrary, payment by an agent of this kind must necessarily be done at the place where all the business is transacted. More than the actual decision in the case, what obviously impelled Mr. Ram Mohan to cite the decision was the following ulterance by the learned Judges:

> "It illustrates the importance of questions of this character which arise, and it also illustrates the necessity of the courts being somet what careful in applying the law so as no- to impose an unreasonable and unanticipated burden upon commercial men, of being dragged from their place of business to defend suits, 800 miles away in parts of the world with which they have no concern whatever".

Learned counsel submitted that this passage, if applied to the present case, would vividly characterise the predicament of the defendants in this suit. I am unable to subscribe to this argument of inconvenience. The place of suing is governed in our country by section 20 of the Code of Civil Procedure. In the face of its provisions, observations such as those found expressed by the Division Bench of the Allahabad High Court, with respect, seem to me to smack of maudlin sentimentality. If parties residing or carrying on their avocations in different parts of the country find it worth their while to transact business with each other notwithstanding the distances which separate them, they must be prepared to be 'dragged' into distant Courts, if that is the right expression to use, when disputes arise which they cannot settle by mutual agreement. To have one's law Court at one's door-steps is not a practicable, or even a desirable, goal in the administration of Civil justice. If, by applying the relevant principles under section 20 of the Code, it is found in a given suit, that part of the cause of action accrues within the jurisdiction of a given Court, the fact that either the one or the other party or, for that matter, both of them, live or carry on business elsewhere can have no relevance to the Court's undoubted jurisdiction to proceed to trial.

23. Rejecting, thus, all the objections raised by the defendant, I hold that the City Civil Court has jurisdiction to entertain and try the

1. (1967) 1 An. W.R. 455: A.I.R. 1968 A.P. 330
2. (1924) I.L.R. 46 All. 465

plaintiff's suit, because a part of the cause of action has accrued at Madras. The order passed by the learned XII Assistant City Civil Judge to the contrary is erroneous. The appeal is allowed and the order of the learned Judge is set aside. The City Civil Court is directed to take back the plaint on its file and proceed to try the rest of the issues in the suit on merits. The defendants will pay the plaintiff's costs in this appeal.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—*S. Mohan, J.*

N.S. Balasubramaniam .. *Petitioner**

v.

State of Tamil Nadu represented by the Secretary to Government, Education Department, Madras-9 and another .. *Respondents.*

Constitution of India (1950), *Article* 14—*Tamil Nadu Private Colleges* (*Regulation*) *Act* (*XIX of* 1976), *sections* 11, 24 (3)—*Professor in a College served with show cause notice by management—Constitutional validity of sections* 11 *and* 24 (3) *of the Act—Whether violative of Article* 14—*Comparing minority colleges with non-minority institutions not correct—Sections* 11 *and* 24 (3) *valid.*

The petitioner was a Professor in a college in Madras. The management issued a show cause memo charging the petitioner with serious misconduct and dereliction of duty. The petitioner, at that stage, filed a writ petition for a declaration that the clause in section 11 of the Tamil Nadu Private Colleges (Regulation) Act, 1976 reading as "not being a minority institution" and section 24 (3) of the said Act being provisions of exemption rendering sections 11 to 14, 18 (2) and 19 to 22 of the said Act inapplicable to minority colleges were *ultra vires* Article 14 of the Constitution of India. The petitioner compared minority institutions with non-minority institutions.

Held: What required to be noted was that all minority institutions were treated alike. It was adumbrated under Article 14 of the Constitution that all equals should be treated alike. In the instant case there was no allegation that all the minority colleges were not treated alike. What the petitioner did was, to put the minority institution as against a non-minority institution to make out a case of inequality. Such a thing was wholly impermissible. Certainly, that was not the concept of Article 14 at all. That being the position, the question of constitutional validity did not arise.

[*Para.* 9.]

Cases referred to:—

G.F. College v. *Agra University*, (1975) 2 S.C.C. 283: (1976) 2 S.C.J. 74: (1975) 3 S.C.R. 810: A.I.R. 1975 S.C. 1821; *St. Xaviers College* v. *State of Gujarat*, (1974) 2 S.C.J. 381: (1975) 1 S.C.R. 173: (1974) 1 S.C.C. 717: A.I.R. 1974 S.C. 1389; *State of Kerala* v. *Mother Provincial* (1971) 1 S.C.J. 641: (1971) 1 S.C.R. 734: A.I.R. 1970 S.C. 2079.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of declaration declaring that the clause in section 11 of the Tamil Nadu Private Colleges (Regulations) Act, 1976 reading as "not being a minority institution" and section 24 (3) of the said Act, being provisions of exemption rendering sections 11 to 14, 18 (2) and 19 to 22 of the said Act inapplicable to minority Colleges are *ultra vires* Article 14 of the Constitution.

K.K. Venugopal for *S. Balathandapani*, for Petitioner.

The Court made the following

ORDER.—The facts leading to the writ petition are as follows:

The petitioner who holds a B.Com. (Hons) Degree of the Madras University and M.A. Degree of the Banaras University in Economics as well as M.Com Decree of the Aligarh University and had obtained a Fellow ship of the Institute of Commerce, London, was appointed as Professor of Commerce, Agurchand Manmull Jain College (second respondent herein). He has been working there since 1966. During the academic year 1977-78 there was sporadic agitation by the students which required the closure of the college for about a fortnight. This according to the petitioner, was done without consulting the

*W.P. No. 824 of 1978. *9th March*, 1978.

College Council. Certain allegations were made against the Principal and the Association of Teachers of the second respondent college passed a resolution on 28th October, 1977 requesting the management to probe into those allegations. The management issued memos to all the members of the Association of Teachers to state whether they were signatories to the resolution dated 28th October, 1977 and if that were so, why disciplinary action should not be taken against those signatories. This led to some bitterness between the management and the Association of Teachers which continued for some time. By memos dated 8th November, 1977 and 30th November, 1977 which were issued to the petitioner it was stated that he had been accepting teaching assignments in the S.I.E.T. Women's College and Davar's College of Commerce without the written permission of the Management, that proper arrangements for the subject "business organisation" had not been made for the students of the First Year B.Com, (Evening) Session and that he was taking part in inciting action by the students against the Management during the working hours in the campus. The petitioner replied to those charges on 5th December, 1977 and on 19th December, 1977, another memo emanated from the management charging the petitioner with serious misconduct and dereliction of duty. By his letter dated 23rd December, 1977, the petitioner requested for copies of the documents in order to enable him to submit a detailed *explanation*. It is at this stage, the petitioner has come to this Court with this writ petition for a declaration to declare that the clause in section 11 of the Tamil Nadu Private Colleges (Regulation) Act, 1976 reading as "not being a minority institution' and section 24 (3) of the said Act being provisions of exemption rendering sections 11 to 14, 18 (2) and 19 to 22 of the said Act inapplicable to minority colleges are *ultra vires* of Article 14 of the Constitution of India.

2. The grounds stated in the affidavit may briefly be set out as follows:

The provisions of law regulating the establishing and administering of educational institutions which violate the rights of minorities would be liable to be declared void as being inconsistent with Article 30 of the Constitution. However, if such a law affords protection to minorities which are not essential to or required by Article 30 of the Constitution, such provisions would discriminate against the right to equality guaranteed by Article 14 of the Constitution. Sections 11 to 14 of the Act are made inapplicable to minority colleges. Section 11 read with rule 8 of the Rules made under the Act would entitle the Principal of the College and two senior-most Professors to be on the College Committee along with the nominees of the Educational Agency. Such a right is not available to the petitioner. To associate the members of the teaching staff with the task of defining the standards of conduct to be observed by teachers and other persons employed in the private College would be in the interests of better administration of the institution and for improving the standards of education imparted in the college. Therefore, under Article 30 of the Constitution of India, no minority institution can demand that a member of the teaching staff should perforce find a place on the committee of management. If any such preference is given to a minority institution it will be violative of Article 14 of the Constitution.

3. Section 24 (3) of the Act which exempts a minority College from being governed by the provisions of section 18 (2) of the Act also contravenes Article 14 of the Constitution. Section 18 (2) is a provision which lays down the standard of conduct to be observed by teaching and non-teaching staff of private colleges on the one side and the other institutions on the other so far as the standard of conduct to be observed by them. Article 30 would not in any manner be violated by definition of the standard of conduct to be observed by teaching and non-teaching staff of the minority colleges. Even if it is to be done by the College Committee contemplated to be established under section 11, it is only the Principal and the two senior-most Professors have to be on the Committee.

4. Then again the exemption of the minority colleges from being governed by the provisions of section 19 (1) and (2) of the Act would violate Article 14 of the Constitution of India. The competent authority contemplated under the said Act is the University or an authority, officer or person empowered by the Government by notification to be the competent authority. The said provisions do not in any manner displace, the administration of the institution, and at best, it merely provides for a regulatory measure for the proper and efficient administration of the institution in matters relating to disciplinary action. Such regulation could be made for ensuring proper

conditions of service and to secure a fair procedure in the matter of disciplinary action.

5. Exemption from being governed by section 19 (3) of the Act is also equally violative of Article 14 of the Constitution. That relates again to suspension by way of disciplinary action. To exempt section 19 (3) (*a*) from being applied to teaching and non-teaching staff of minority institutions would result in the arbitrary use of the power of suspension even where the charge levelled against the teaching and non-teaching staff would not amount to gross misconduct otherwise. Equally, the right of appeal to the Tribunals under sections 20, 21 and 22 of the Act is denied to the petitioner by the grant of exemption on the ground that the second respondent is a minority institution.

6 Mr. K. K. Venugopal, learned counsel for the petitioner, draws my attention to section 11 and also rule 8 of the Tamil Nadu Private Colleges (Regulation) Act, 1976 and then says that while the Act was in the form of a Bill, the words "not being a minority institution" were not found but those words came to be introduced only when it became an Act. Rule 8 (3) which speaks about the constitution of committee requires under rule 8 (3) (*b*) and (*c*) Principal of the College and two senior-most Professors. The petitioner being a member of the Teachers' Association could claim to have his representation on the committee which committee alone would have the authority to take the disciplinary action. The disciplinary action taken by the Management, therefore, would be violative of Article 14 of the Constitution of India.

7. Under Article 30 of the Constitution, no doubt, the minority institution has the right to establish and administer educational institutions of its choice. But that does not mean that there cannot be a committee to carry on the general administration or any such other purpose mentioned in section 14. To provide for such a committee does not infringe Article 30 of the Constitution. It has been so laid down in *G. F. College, Shahjahanpur* v. *Agra University*.[1] Then again in *St. Xaviers College* v. *State of Gujarat*,[2] it has been held that such measures are only in the nature of regulations and they do not in any way affect the fundamental right of the minority institution. These cases would fully support the argument of the petitioner. Where therefore a minority institution is exempted from the operation of sections 11 to 14 and sections 18 (2) and 19 to 22 by section 24 (3) of the Act it will be clearly discriminatory.

8. It is further argued by the learned counsel that inasmuch as the point raised here involves the determination of the constitutional validity of certain provisions of the Act either by the application of Article 228-A (3) or 228 (4) of the Constitution, such determination relating to the constitutional question, leave alone the invalidity thereof, must be adjudged only by five Judges, since there is a vital distinction between the said Article and Article 226 (3) of the Constitution which states about entertaining of the petition.

9. In order to appreciate whether there is any violation of Article 14 of the Constitution which arises in this case at all, let me look at the relevant sections because the determination of this question has a bearing on my jurisdiction to hear this matter and hold against the petitioner. Section 11 of the Tamil Nadu Private Colleges (Regulation) Act, 1976 (hereinafter referred to as the Act) occurs under Chapter III which deals with the college committee and its constitution and functions, and states that every private college, *not being a minority college*, shall have a college committee which shall include the Principal of the private college and two senior Professors employed in the private college (Italics supplied). Section 12 of the Act speaks of the Secretary of the College committee. Section 13 says about the meetings of the college committee while section 14 deals with the functions of the college committee and responsibility of the educational agency under the Act. Then again, section 18 (2) reads:—

> "(2) The college committee may define the standards of conduct to be observed by teachers and other persons employed in the private college, such standards not being inconsistent with the provisions of this Act and the rules made thereunder."

Sections 19 to 22 deal with the disciplinary action that could be taken against a teacher or other person employed in any private college, the appeal arising therefrom and the second appeal etc. Section 24 (3) states thus:

> "(3) The provisions of sub-section (2) of section 18 and of sections 19 to 22 (both inclusive) of this Chapter or any rule providing

1. (1975) 2 S.C.C. 283: (1975) 3 S.C.R. 810: (1976) 2 S.C.J. 74: A.I.R. 1975 S.C. 1821.
2. (1974) 2 S.C.J. 381: (1975) 1 S.C.R. 173: (1974) 1 S.C.C. 717: A.I.R. 1974 S.C 1389.

for all or any of the matters specified therein or any order made in relation to any such matter *shall not apply to a minority college*". (Italics supplied.)

What requires to be noted carefully is that all minority institutions are treated alike. It is adumberated under Article 14 of the Constitution that all equals must be treated alike. In the instant case, there is no denial that all the minority colleges are not treated alike. What the petitioner does is, pitting the minority institution as against non-minority institution seeks to make out a case of inequality. Such a thing is wholly impermissible under Article 14 of the Constitution. Certainly, that is not the concept of Article 14 at all. That being the position, the constitutional validity does not arise.

10. The decision in *G.F. College, Shahjahanpur* v. *University*,[1] is a case wherein the college claimed the fundamental right under Article 30 of the Constitution. Their Lordships of the Supreme Court held that the University statute requiring that the Managing Committee of minority educational institution (College) shall include the principal of the College and the seniormost member of the teaching staff being regulatory in character does not offend Article 30 of the Constitution. The situation here is entirely different. This is not a case of a college claiming the protection under Article 30. Here again, what requires to be noted is Article 30 is equally a fundamental right conferred upon the institution. The petitioner has no fundamental right to be represented on the College Committee since the constitution of the committee arises only by a statute. Therefore, if at all he has a right of representation, it is only a statutory right. The legislature in its wisdom and having regard to the statutory provisions of Article 30 of the Constitution has made these provisions inapplicable to the minority institutions. For aught we know by the contitution of a college committee, the administration may go to a body in the selection of whom the founders may have no say and the entire administration might be displaced as laid down in the decision reported in *State of Kerala* v. *Mother Provincial*[2].

11. The reliance placed on *St. Xaviers College* v. *State of Gujarat*[3], is again not justified. In that case at page 1427 it was laid down thus:

"Although disciplinary control over the teachers of a minority educational institution would be with the governing council, regulations, in my opinion, can be made, for ensuring proper conditions of service of the teachers and for securing a procedure in the matter of disciplinary action against the teachers."

In the instant case, we are not concerned with any of the regulations relating to the conditions of service of the teachers and the procedures to be followed in the matter of disciplinary action against the teachers. Therefore, I conclude that there is no scope for invoking Article 14 of the Constitution at all.

12. In this background let me analyse the provisions of Article 228-A of the Constitution which is very much relied upon by the learned counsel to advance the argument that I will have no jurisdiction to deal with this matter since it raises a question as to the constitutional validity of the provisions of the Act. Article 228-A (2) says:

"Subject to the provisions of Article 131-A, the High Court may determine all questions relating to the constitutional validity of any State law".

Article 228-A (3) says:

"The minimum number of Judges who shall sit for the purpose of determining any question as to the constitutional validity of any State law shall be five".

Proviso is omitted as unnecessary.

Again clause (4) says:

"A State law shall not be declared to be constitutionally invalid by the High Court unless

(*a*) where the High Court consists of five Judges or more, not less than two-thirds of the Judges sitting for the purpose of determining the validity of such law, held it to be constitutionally invalid; and

(*b*) * * * * * *".

Rest of the clauses are omitted as not relevant. If, as I held above, there is no scope for application of Article 14 of the Constitution at all, *a fortiori* it would follow that neither Article 228-A (3) nor Article 228-A (4) would ever be attracted. Therefore, I am of the view that I have every jurisdiction to decide this case.

13. In the result, the writ petition is hereby dismissed.

S.J. ——— *Petition dismissed.*

1. (1976) 2 S.C.J. 74: A.I.R. 1975 S.C. 1821.
2. (1971) 1 S.C.J. 641: (1971) 1 S.C.R. 734: A.I.R. 1970 S.C. 2079.
3. (1974) 2 S.C.J. 381: A.I.R. 1974 S.C. 1389.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

V. Balakrishna Menon .. *Petitioner**

v.

M.A.K. Govindan .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *section* 10 (3) (a) (*i*)—*Building let for residential as well as for non-residential purpose—Eviction petition—Relief of possession for residential purpose sought—Petition whether maintainable.*

Section 10 (3) (*a*) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act uses the expression "residential building". Section 10 (3) (*a*) (*ii*) uses the expression "non residential" building which is used for the purpose of keeping a vehicle or adapted for such use and section 10 (3) (*a*) (*iii*) uses the expression "any other non-residential building". There is however no definition of the expression "residential building" or "non-residential" building and all that section 2 (2) of the Act states in relation to the definition of a building is that it is a building let out for residential or non-residential purpose. [*Para.* 4.]

The contention that where a building is let for both residential and non-residential purposes, such a building is outside the scope of the Act itself is an extreme argument. [*Para.* 10.]

It is not uncommon that many advocates and doctors use a room or two in their residence for official purposes such as a consultation room in the case of an advocate. There are several instances in our State, if not in our country, where in metropolitan cities many persons reside without their families in connection with their profession, employment or business and they happen to take their food in a private mess. There are several cases where a part of a residential building is used for running a private mess by the tenant. It could not have been the intention of the legislature that a very large category of buildings be left outside the scope of the Act because they have been let out for both residential or non-residential purposes. It is not as if, except in a very few cases, in all the cases it could not be found out as to what the main, dominant or the principal purpose for which the building is let out was. For instance, in the case of a lease of a building to an advocate who uses a room or two in the house for office purposes there is no difficulty in holding that the dominant and main purpose of lease was residential. So will be the case of a lease to a doctor. Consequently there is absolutely nothing in the language or the scheme of the Act to show that the legislature intended to confine the tenancies covered by the Act only to cases where the building was let out, exclusively for residential purpose or non-residential pupose and did not intend the Act to cover a case where the building has been let out partly for residential purposes and partly for non-residential purpose. [*Para.* 10.]

The Act classifies purposes only into two categories, residential and non-residential, and therefore the test for finding out whether in a particular case it was for a residential purpose or non-residential purpose, has to be in the light of the observations of the Full Bench in *Dakshinamurthy* v. *Thulja Bai,* (1952) 1 M.L.J. 390 and the test is to find out the real, the main and substantial purpose of the letting. [*Para.* 8.]

Cases referred to:—

Dakshinamurthy, v. *Thulja Bai* (1952) 1 M.L.J. 390: I.L.R. (1952) Mad. 651: 65 L.W. 242: A.I.R. 1952 Mad. 413; *Miss S. Sanjal* v. *Gian Chand,* (1968) 1 S.C.R. 536: A.I.R 1968 S.C. 438; *Dr. Gopal Dass Verma* v. *Dr. S.K. Bharatwaj and another,* (1961) 2 S.C.J. 616: (1962) 2 S.C.R. 678: A.I.R. 1963 S.C. 337; *S. Kartar Singh* v. *Chaman Lal,* (1969) 1 S.C.C. 760: (1969) 2 S.C.J. 813: (1970) 1 S.C.R. 9: A.I.R. 1969 S.C. 1288; *Harnam Singh* v. *Jaml Pirbhai,* 1951 A.C. 688.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Subordinate Judge (Appellate Authority) Madurai dated 21st April, 1977 and made in C.M.A. No. 162 of 1976 (R.C.O.P. No. 78 of 1974 II Additional District Munsif-Rent Controller Madurai Town).

M R. Narayanaswami and *K.R. Vijayakumar,* for Petitioner.

The Court made the following

ORDER.—This is a petition filed by a tenant to revise the order of the Appellate Authority func-

*C.R.P. No. 2063 of 1977. *31st March,* 1978.

tioning under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (Tamil Nadu Act XVIII of 1960 (hereinafter referred to as the Act) directing the eviction of the petitioner herein from the premises in question. Most of the facts are not in controversy. The respondent filed a petition under the provisions of the Act for eviction of the petitioner herein on three different grounds. One was that he *bona fide* required the premises for his own occupation, the second was that the petitioner has committed wilful default in the payment of the rent and the third was that the petitioner had put the property to a use different from the one for which it was leased out. The petitioner denied all the three grounds. The Rent Controller rejected all the three grounds and dismissed the petition for eviction filed by the respondent herein. Thereupon, the respondent preferred an appeal to the Appellate Authority prescribed under the Act. Before the Appellate Authority, the finding of the Rent Controller on the second and the third grounds was not challenged. The only ground on which the appeal was prosecuted was that the respondent herein *bona fide* required the premises for his own occupation, that he was living in a rented premises and that he had no other building in the place in question. The Appellate Authority accepted this contention of the respondent herein and ordered the eviction of the petitioner from the premises in question. It is this order of the Appellate Authority, that is sought to be revised in the present civil revision petition filed under section 25 of the Act.

2. Before proceeding with the question of law that was sought to be raised before this Court, I must refer to the nature of the defence put forward by the petitioner herein in respect of this particular ground for eviction, namely, the respondent herein *bona fide* required the building for his own occupation. The contention that was advanced was that the building was let out for residential as well as for non-residential purposes and therefore the respondent herein cannot obtain possession of the premises for his own residential purpose. This contention was rejected by the Appellate Authority following the decision of a Full Bench of this Court in *Dakshinamurthy* v. *Thulja Bai*[1]. That judgment held that for the purpose of finding out whether the purpose for which a building was let out was residential or non-residential the dominant purpose has to be determined and if the dominant purpose was residential, the fact that a part of the premises was put to non-residential use will not change the character of the original purpose and *vice versa*. The learned counsel for the petitioner challenges this conclusion. Mr. M R. Narayanaswami, learned counsel for the petitioner did not contend that the decision of the Appellate Authority is not in accordance with the Full Bench decision of this Court referred to already. On the other hand, the learned counsel had to concede that the law laid down by the Full Bench of this Court is to that effect only and the Appellate Authority, simply followed the Full Bench decision. However what he contends is that in view of the subsequent decisions of the Supreme Court the Full Bench decision is no longer good law, since according to the learned counsel for the petitioner the Supreme Court has held that in such cases, where a building has been let out for residential as well as non-residential purpose the Rent Controller has no jurisdiction at all under the Act to order eviction of the tenant. Therefore, I have to consider in the present civil revision petition the soundness or otherwise of this contention.

3. In this particular case the Appellate Authority as far as the purpose of the tenancy is concerned has recorded the following finding:—

> "It is clear that the building was taken by him (petitioner-tenant) for residential and non-residential purpose and the evidence would also go to show that the tenant has been residing with his family in a major portion of the building and only a minor portion of it has been used for non-residential purpose that is for the purpose of using it as an office for the yarn broker business conducted by the tenant and it is therefore absolutely clear that the building in question was let out to the tenant mainly and substantially for residential purpose and incidentally for non-residential purpose and that being so, the building has got to be construed only as a 'residential building.' This is the finding of fact against the background of which the eviction was ordered by the Appellate Authority and it is the correctness of this conclusion that has now to be examined."

4. As far as the Act is concerned, section 2 (2) of the Act defines the term 'building' and the same is as follows:—

1. (1952) 1 M.L.J. 390: 65 L.W. 242: I.L.R (1952) Mad. 651: A.I.R. 1952 Mad 413.

" "Building" means any building or hut or part of a building or hut let or to be let separately for residential or non-residential purposes and includes......"

Section 10 of the Act deals with the eviction of tenants Section 10 (1) is in general terms and it states that a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16. Sub-section (2) of section 10 deals with the eviction of a tenant on these grounds, the grounds being (*i*) default in the payment of rent; (*ii*) subleasing or subletting the property; (*iii*) using the building for a purpose other than that for which it was leased; (*iv*) causing act of waste; (*v*) the tenant being convicted under any law for the time being in force of an offence of using the building or allowing the building to be used for immoral or illegal purposes; (*vi*) that the tenant has been guilty of such acts and conduct which are a nuisance to the occupiers of other portions in the same building or of buildings in the neighbourhood; (*vii*) that where the building is situated in a place other than a hill station, the tenant has ceased to occupy the building for a continuous period of four months without reasonable cause; and (*viii*) that the tenant was denying the title of the landlord or claiming a right of a permanent tenancy and that such denial or claim was not *bona fide*. It is sub-section (3) of section 10 with which we are immediately concerned. Section 10 (3) (*a*) along with clauses (*i*), (*ii*) and (*iii*) reads as follows:—

10 (3) (*a*): "A landlord may subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the building. (*i*) in case it is a residential building if the landlord requires it for his own occupation or for the occupation of any member of his family and if he or any member of his family is not occupying a residential building of his own in the city, town or village concerned;

(*ii*) in case it is a non-residential building which is used for the purpose of keeping a vehicle or adapted for such use, if the landlord requires it for his own use or for the use of any member of his family and if he or any member of his family is not occupying any such building in the city, town or village concerned which is his own;

(*iii*) in case it is any other non-residentia building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on a non-residential building in the city, town or village concerned which is his own".

Thus, it will be seen that section 10 (3) (*a*) (*i*) uses the expression "residential building". Section 10 (3) (*a*) (*ii*) uses the expression a "non-residential" building which is used for the purpose of keeping a vehicle or adapted for such use and section 10 (3) (*a*) (*iii*) uses the expression "any other non-residential building." It is pertinent to point out that in the Act, there is no definition of the expression "residential building" or "non-residential building" and all that we have in section 2 (2) of the Act in relation to the definition of a building is a building let out for residential or non-residential purposes. It is in this context only the Full Bench had to consider as to what is meant by a residential building and a non-residential building as used in section 7 of the Act then in force. The Act that was in force when the Full Bench rendered its decision was the Tamil Nadu Buildings (Lease and Rent Control) Act, 1949 (XXV of 1949). That the corresponding provisions of that Act were similar to what we are considering is not in dispute. The section dealing with the eviction of a tenant was section 7 and the sub-section relevant was sub-section (3). There also the Full Bench had to consider the question as to what exactly is the meaning of the expression residential building or non-residential building. Rajamannar, CJ. sitting with Panchapakesa Ayyar, J. who referred the matter to a Full Bench pointed out as follows:—

"If the definition of 'building' gives a clue, then, a residential building is a building let or to be let for residential purposes. That furnishes no doubt a simple test which has also the merit of reasonable certainty. But I have found it difficult to adopt that test in the case of a building which for instance might be the family house of the owner in which he and his predecessors had been residing for years and therefore was at one time a residential building which however has been let for business purposes at the material period. The question will then arise whether there has been a conversion of a residential building into a non-residential building."

The opinion of the Full Bench was given by Raghava Rao, J. who in substance accepted this view of Rajamannar, C.J. The Full Bench observed as follows:—

> "For the purpose of determining whether a building is residential or non-residential according to the view expressed above what a 'residential building' means we have to bear in mind a few a salient considerations, which we propose to indicate.
>
> (1) where there is an instrument of tenancy specifically and explicitly declaring the purpose of the letting as residential or non-residential, no difficulty generally arises.
>
> (2) Where there is no such instrument of tenancy, the question will have to be considered on the basis of direct evidence *aliunde* concerning the purpose of the letting which may be adduced in a case.
>
> (3) If no such evidence too is forthcoming, the Court can only look at the evidence concerning the user of the premises by the tenant down to the date of the application for eviction as acquiesced in by the landlord. For such user and such acquiescense afford a safe basis for an inference of agreement between the parties as to the purpose of the letting.
>
> (4) Where there is evidence of such user, but there is no evidence of such acquiescence the structural design, the antecedent user of the building by the landlord as known to the tenant and other surrounding circumstances if any, will also have to enter into the determination of the question whether the building is or is not residential.
>
> (5) Difficulty may sometimes still remain i.e., even after applying the tests above indicated, if the building is found let for both kinds of purposes, residential and non-residential, no distinction being made between one part as let for one purpose and the other for the other purpose. In such a case, it seems to us that what has to be determined as a question of fact, is what was the real main and substantial purpose of the letting."

After setting out the above general considerations, the Full Bench proceeded to consider certain decisions of Courts in England rendered with reference to Rent Restrictions Acts prevailing there and after such consideration, the Full Bench proceeded to observe:

> "Here in our statute as we have already observed, we do not have any provision such as came to be enacted in the English Act of 1920 by way of giving effect to the Epsom decision, and if the juristic criticism applied to the Epsom decision by McCardie J. is to be accepted as sound there is no reason why the test of dominant purpose and principal user propounded by the learned Judge should not be regarded as applicable to cases arising under our statute.
>
> It is true that the test of dominant purpose and principal user is not always easy of application, applied certainly it can be speaking generally though with some difficulty in some cases. Such difficulty in the actual application of the test in such cases will only mean that a margin of Judicial discretion in the matter of the determination of the question of the character of the building as question of fact has necessarily to be allowed for. Instances of transactions inspired by mixed motives and intents in which the question of the main, real and dominant motive and intent has to be canvassed for validating or invalidating them are not uncommon in other branches of law. There can, in our judgment, be no reason of principle why a canvas of the main, real and dominant purpose should be regarded as not legitimate in this branch of law in cases where the letting is actuated by mixed purposes."

Even after making the above observation, the Full Bench proceeded to refer to a marginal case by stating:—

> "It only remains to add that where the Court finds the letting to be equally for residential and non-residential purposes and not mainly or substantially for the one or the other kind of purpose the application by the landlord may well stand whether filed under section 7 (3) (*a*) (*i*) or section 7 (3) (*a*) (*ii*) of the Act.
>
> Judging the case before us on the facts found and in the light of the legal principles indicated in the foregoing we are of opinion that the purpose of the letting being non-residential the mere structural fitness of the building for residence at the time of the letting does not avail the respondent to contend that because he is not in occupation of a residential building of his own in the city and requires this building for his own occupation, he can evict the petitioner from the premises."

Thus it will be seen that as far as our present Act is concerned, there is no definition of the terms "residential building" and "non-residential building" which terms are used in section 10. Yet whether a particular building is a residential or non-residential building has to be decided with reference to the purpose for which it was let out because section 2 (2) of the Act defining the word 'building' referred to only two purposes, residential and non-residential. If it was let out for residential purpose, it was a residential building and if it was let out for non-residential purpose it was a non-residential building. As the Full Bench has pointed out a question will arise where a building has been let out for both the purposes, partly residential and partly non-residential. Then in which category of the purpose the case would fall, whether residential or non-residential? It is only in that context the Full Bench pointed out that the test was to find out the real main and substantial purpose of the letting. In other words, the dominant purpose of the letting will determine the character of the building whether it is residential or non-residential. If it is residential the building will be residential and if it is non-residential the building will be non-residential. With reference to this observation of the Full Bench, the finding of the Appellate Authority to which I have drawn attention, becomes relevant, and on the basis of that finding namely, the building was let out mainly and substantially for residential purpose and incidentally for non-residential purpose, the building will fall within the scope of the expression "residential building" and would therefore come within the ambit of section 10 (3) (a) (*i*). I may indicate that even with reference to a non-residential building, the Act makes a distinction between two sets of non-residential buildings, one is under section 10 (3)(*a*) (*ii*) and the other under section 10 (3) (*a*) (*iii*). The only type of non-residential building expressly dealt with under section 10 (3) (*a*) (*ii*) is a non-residential building which is used for the purpose of keeping a vehicle or adapted for such use. All other non-residential buildings are dealt with under section 10 (3) (*a*) (*iii*). If only we remember that the section 10 (3) (*a*) (*iii*) uses the expression "for purposes of a business" we can easily equate the non-residential building contemplated under section 10 (3) (*a*) (*iii*) with a building let out for commercial purposes. As I pointed out already, the conclusion of the Appellate Authority is fully in accordance with the decision of the Full Bench of this Court referred to above and therefore unless the learned counsel for the petitioner succeeds in showing that the decision of the Full Bench is no longer good law in view of the decision of the Supreme Court on which he relied, the civil revision petition has to be dismissed. Consequently the question for consideration is whether the decision of the Supreme Court has the effect of voiding the decision of the Full Bench of this Court.

5. The decision of the Supreme Court relied on is that in *Miss. S. Sanyal* v. *Gian Chand*[1]. In that case, the appellant before the Supreme Court had been a tenant of a house, a part of which was used for a Girls' school and the rest for residential purpose. The respondent in that appeal who had purchased the building from the previous owner commenced an action against the appellant for a decree in ejectment in respect of the house. The ground with which the Supreme Court was concerned was that the landlord required the premises *bona fide* for his own occupation. The trial Court dismissed the suit and the Senior Subordinate Judge, Delhi dismissed an appeal from the order holding that the house being let for purposes non-residential as well as residential, a decree in ejectment could not be granted under section 13 (1) (*e*) of the Delhi and Ajmer Rent Control Act, 1952. However, the High Court of Punjab (Delhi Bench) in a revision petition filed by the respondent held that on the finding recorded by the First Appellate Court, a decree in ejectment limited to that portion of the house which was used for residential purposes by the tenant could be granted, and remanded the case to the Rent Controller for demarcating those portions which were being used for residence and to pass a decree in ejectment from those specific portions of the house. It was against that order of the High Court of Punjab the appeal was preferred to the Supreme Court and the Supreme Court extracted section 13 (1) (*e*) of the Delhi and Ajmer Rent Control Act, 1952 which was as follows:—

> "*Section* 13 (1): Notwithstanding anything to the contrary contained in any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by any Court in favour of the landlord against any tenant (including a tenant whose tenancy is terminated):
>
> Provided that nothing in this sub-section shall apply to any suit or other proceeding

1. (1968) 2 S.C.J. 218: (1968) 1 S.C.R. 536: A.I.R. 1968 S.C. 438.

for such recovery of possession if the Court is satisfied......

(*e*) that the premises let for residential purposes are required *bona fide* by the landlord who is the owner of such premises for occupation as a residence for himself or his family and that he has no other suitable accommodation.

Explanation:—For the purposes of this clause, 'residential premises' include any premises which having been let for use as a residence are without the consent of the landlord used incidentally for commercial or other purposes."

The Supreme Court proceeded to observe as follows:—

"It is clear that section 13 (1) imposes a ban upon the exercise of the power of the Court to decree ejectment from premises occupied by a tenant. The ban is removed in certain specific cases, and one such case is where the premises having been let for residential purposes, the landlord requires the premises *bona fide* for occupation as a residence for himself or the members of his family and he has no other suitable accommodation. It is plain that if the premises are not let for residential purposes clause (*e*) has no application, nor on the express terms of the statute does the clause apply where the letting is for purposes residential and non-residential."

The Supreme Court proceeded to observe:—

"If in respect of premises originally let for residential purposes a decree in ejectment cannot be passed on the grounds mentioned in section 13 (1) (*e*), if subsequent to the letting with the consent of the landlord the premises are used both for residential and non-residential purposes, the bar against the jurisdiction of the Court would be more effective when the original letting was for purposes non-residential as well as residential. It may be recalled that the condition of the applicability of section 13 (1) (*e*) of the Act is letting of the premises for residential purposes."

6. Relying on this decision of the Supreme Court, the learned counsel for the petitioner contends that in the present case, the letting was for both residential and non-residential purposes and as the Supreme Court held with reference to the Delhi and Ajmer Rent Control Act, 1952, it must be held in the present case that section 10 (3) (*a*) (*i*) does not apply. I am afraid that this argument has no substance because the provisions of the Delhi and Ajmer Rent Control Act, 1952, are not *in pari materia* with the provisions of the statute with which we are concerned. I shall immediately mention the basic difference with reference to the provisions which we are considering.

7. Section 2 (*g*) of the Delhi and Ajmer Rent Control Act, 1952 defines the expression "premises" and the same is as follows:—

"'Premises' means any building or part of a building which is or is intended to be let separately for use as a residence or for commercial use or for any other purpose and includes........."

Thus it will be seen that as far as the Delhi and Ajmer Rent Control Act, 1952, is concerned there is a threefold classification of the purpose for which a building could be let, the three purposes being (*i*) for the purpose of residence (*ii*) for commercial use and (*iii*) for any other purpose. The Supreme Court in *Dr. Gopal Dass Verma* v. *Dr. S. K. Bhardwaj and another*[1] had occasion to consider the threefold classification of the purposes contained in the Delhi and Ajmer Rent Control Act, 1952. The Supreme Court after referring to section 2 (*g*) of the Act observed as follows:—

"The three kinds of user to which the definition refers are residence, commerce and any other purpose which necessarily must include residence and commerce combined. It may also include other purposes as suggested by the learned Soliciter-General. As soon as it is shown that the premises have been let both for the use of residence and for commercial purposes it does not follow that the premises ceases to be premises under section 2 (*g*); they continue to be premises under the last clause of section 2 (*g*). This position is wholly consistent with the division of the premises made with reference to their user in paragraphs 3, 4 and 5 of part A in the Second Schedule to the Act".

Thus, it will be seen that the Delhi and Ajmer Rent Control Act, 1952 basically differs from the provisions of our Act in respect of the definition of the term 'building' and the purposes for which it could be let out. While our statute contemplates only two purposes 'residential' and 'non-residential' the Delhi and Ajmer Rent Control Act, 1952 contemplates

1. (1961) 2 S.C.J. 616: (1962) 2 S.C.R. 678: A.I.R. 1963 S.C. 337.

three purposes, residential, commercial and any other purpose, and according to the Supreme Court "any other purpose" will include the letting of a premises for both residential and commercial purposes. In our statute, the third category of the purpose is not there and on the other hand, we have only a dichotomous division of the purpose. Consequently, unless we are forced to reach the conclusion that a particular building or letting has been taken out of the scope of the Act itself, we have to allot a particular building into one or the other of the two categories, namely residential or non-residential. It is only in this light that the Full Bench of this Court laid down the test of finding out the main real and dominant purpose of the letting for the purpose of allocating the building to one or other of the two categories, namely residential or non-residential.

8. The subsequent decision of the Supreme Court in *S. Kartar Singh* v *Chaman lal and others*[1] is also to the same effect. There also the Supreme Court referred to its earlier decision in *Dr. Gopal Dass Verma* v. *Dr. S.K. Bhardwaj*[2] and held that the statute contemplated a threefold purpose and in fact used the very same expression the Full Bench of this Court used, while making some observations concerning the English Act and decisions. The Supreme Court observed as follows:—

"The position in England is different where premises are let partly for business purposes and partly for residence. There the statutory provisions lay down that where a dwelling is let partly for business purposes and partly for residence, the Rent Act applies to the whole. Morever, where there is no covenant as to user and the question is what user was contemplated, by the tenancy agreement; the test was the 'main purpose' or 'predominant intention' or 'the prevailing contemplation' or 'a preponderating contemplation for the letting'. We are unable to derive any assistance from the English cases on the point."

In fact, the above observation of the Supreme Court will support the Full Bench decision of our Court with reference to our statute because our statute classifies purposes only into two categories, residential and non-residential and therefore the test for finding out whether in a particular case it was for residential purpose or non-residential purpose, has to be in the light of the observations by the Full Bench.

9. In this context it will be useful to refer to the decision of the Judicial Committee of the Privy Council in *Harnam Singh* v. *Jamat Pirbhai*[1] which dealt with the provisions contained in the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940 of Kenya. The Judicial Committe at page 701 observed as follows:—

"In their Lordships' view, the effect of this legislation was to create two independent codes applying to dwelling houses on the one hand and to premises used for business purposes and the other specified purposes (which for brevity may be called 'business premises' (on the other. In each the subject the possession of which is under statutory protection is a physical unit, either the dwelling house or the business premises; and in the case of 'mixed' premises which have some connexion with both descriptions, the true problem is to discover to which of the two categories such a property ought the more appropriately to be ascribed since it is a contradiction in terms that it should be ascribed simultaneously to both."

10. In view of the position resulting from the decisions of the Supreme Court cited above, Mr. M.R. Narayanaswami, learned counsel for the petitioner was forced to contend that as far as our statute is concerned, where a building is let for both residential and non-residential purposes such a building is outside the scope of the Act itself. Of course it is an extreme argument and unless we are driven to that position with reference to the language of the enactment, such a contention cannot be accepted. In my view, the argument of the learned counsel will lead to unintended consequences. If that argument is accepted, in every case where a building has been let out for both residential and non-residential purposes, the building will be outside the scope of the Act, not only with reference to eviction but also with regard to payment of rent and other benefits sought to be conferred by the Act on the tenants. In *S. Kartar Singh* v. *Chaman Lal and others*[2]

1. (1969) 2 S.C.J. 813: (1970) 1 S.C.R. 9: A.I.R. 1969 S.C. 1288.
2. (1961) 2 S.C.J. 616: A.I.R. 1963 S.C. 337.

1. (1951) A.C. 688.
2. (1969) 2 S.C.J. 813: A.I.R. 1969 S.C. 1288.

an advocate while residing in the same premises used a part thereof for his professional purpose. In *Dr. Gopal Dass Verma* v. *Dr. S.K. Bhardwaj.*[1] a doctor used a portion of the premises in which he was residing for his professional purposes. It is not uncommon that many advocates and doctors use a room or two in their residence for official professional purposes such as a consultation room in the case of an advocate. If the argument of Mr. M. R. Narayanaswami is to be accepted, all those cases will fall outside the statute. There are several instances in our State, if not in our country where in metropolitan cities many persons reside without their families, in connection with their profession, employment or business and they happen to take their food in a private mess. There are several cases where a part of a residential building is used for running a private mess by the tenant. If the argument of the learned counsel is to be accepted, all those buildings will be outside the scope of the Act both with reference to liability to eviction of the tenant and with reference to the fixation of fair rent also. It would not have been the intention of the legislature that a very large category of buildings be left outside the scope of the Act because they have been let out for both residential and non-residential purposes. It is not as if except in a very few cases, in all the cases it could not be found out as to what the main, dominant or the principal purpose for which the building is let out was. The cases to which I have drawn attention can easily be brought into one or the other of the two categories. For instance, in the case of a lease of a building to an advocate who uses a room or two in the house for office purposes, there is no difficulty in holding that the dominant and main purpose of the lease was residential. So will be the case of a lease to a doctor to which I have made reference already. Consequently, there is absolutely nothing in the language or the scheme of the Act to show that the legislature intended to confine the tenancies covered by the Act only to cases where the building was let out exclusively for residential purpose or exclusively for non residential purpose and did not intend the Act to cover a case where the building has been let out partly for residential and partly for non-residentinl purpose. In view of this position, I am unable to accept the extreme contention put forward by the learned counsel for the petitioner.

1. (1961) 2 S.C.J. 616: A.I.R. 1963 S.C. 337.

11. For the above reasons, I hold that the order of the Appellate Authority is correct and it does not call for any interferenee. The Civil Revision Petition fails and the same is dismissed. There will be no order as to costs in this petition.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.— *P. Govindan Nair, CJ.,* and *S. Padmanabhan, J.*

Babubhai Patel and another .. *Appellants**

v.

Madavi Patel and another. .. *Respondents.*

Guardians and Wards Act (VIII *of* 1890), *sections* 7, 17 (1) *and* 19 (b)—*Application to be appointed as legal guardian of minor girl of seven years—Principles governing appointment—Welfare of minor paramount consideration.*

Section 17 of the Guardians and Wards Act, dealing with the considerations that should weigh with the Court in appointing or declaring a guardian of a minor, has stated in sub-section (3) that if the minor is old enough to form an intelligent preference the Court may consider the preference. The question would, therefore be whether the child is of an age and maturity when it will be able to make an intelligent preference as to where it should be or with whom it should be. Certainly seven years is too tender an age at which the child would be able to make any intelligent preference. Nor attitude at that time will be governed by the immediate attachments and her likes and dislikes at the moment which can easily be swayed either by too much affection or even by too much of intelligence which is not in the interests of the child. The view expressed by the child when she is only 7 years of age ought not, therefore, weigh too much with the Court. [*Para.* 11.]

At first blush it would appear that there is a conflict between the provision in section 17 (1) and that contained in section 19 (*b*). But it is well-settled that there is no such conflict. It is not as though in all cases when the father is not unfit to be the guardian, the child should be left with the father. Even in such circum-

*L.P A No. 9 of 1977. 21*st March*, 1978.

stances, the Court will have a discretion in the interest and welfare of the minor child to entrust it with some other person when circumstances demand it. In the instant case, the minor had lost her father. [*Para.* 13]

Held, that considering the facts of the case neither the mother of the minor girl nor her grand-parents were fit to be the guardian of the minor girl. The respondents were not strangers. They were closely related, had no other encumbrances, had got sufficient means, and were very fond of the child. There was no suggestion that they would not care for the interests of the child. In these circumstances the child must be left with the respondents in whose custody the child was.

Cases referred to:—

Saraswathi Ammal v. *Dharmakoti Ammal*, (1924) 47 M.L.J. 614: 20 L.W. 902: I.L.R. 48 Mad. 299: A.I.R. 1924 Mad 873 (2); *Pollard* v. *Rouse*, I.L.R. (1910) 33 Mad 288; *Rama Iyer* v. *Nataraja Iyer*, (1948) 1 M.L.J. 125: 61 L.W. 136: A.I.R. 1948 Mad. 294; *Rosy Jacob* v. *Jacob*, (1973) 1 S.C.C. 840: (1974) 2 S.C.J. 129: (1974) 2 M.L.J. (S.C.) 34: (1973) 3 S.C.R. 918: A.I.R. 1973 S.C. 2090; *An infant, in re*, (1969) 2 Ch. 238; *L. (infant), in re*, (1962) 1 W.L.R. 886.

Letters Patent Appeal under clause 15 of the Letters Patent against the order of Mr. Justice Ramanujam dated 21st January, 1977 and made in C.M.A. No. 723 of 1976 preferred to the High Court against the Order of the District Court (Principal), Pondicherry, dated 25th November, 1976 and made in O.P.No. 16 of 1976.

K. Parasaran, for *K. Sarvabhauman* and *K. Sampath*, for Appellants.

The Advocate-General for *R. Krishnamoorty*, *D. Raju*, *A.R. Lakshmanan* and *R. Krishnaswami*, Respondents.

The Judgment of the Court was delivered by

Govindan Nair CJ: The question that arises in this case is about the custody and guardianship of a minor girl of 8 years, and the contestants for custody and guardianship are the appellants on the one side and the respondents on the other.

The appellants are the grandfather and the mother of a young girl. Soon after her birth on the 7th of January, 1970, in August of the same year her father died. The father and the mother (second appellant) of the girl were at that time in Germany. The second appellant came to India (Ahamedabad) with the baby, where her father, the first appellant, and her mother lived. But she found it difficult to live in India with the baby. She decided to go to the Continent and then to the United States. She left very soon afterwards in December, 1970, and the child was then entrusted to the first and second respondents. They are a couple who are related to the first appellant, the grandfather of the child. The second respondent is the sister's son of the first appellant and the first respondent is the wife of the second respondent. The first respondent is a Bengali and the appellants and the second respondent are from Gujarat. The two respondents have no children. They are admittedly in good circumstances. The mother, after leaving India towards the end of 1970, found her way to the United States and there she got married again, but that marriage did not last long and it ended in divorce. Soon afterwards, however, she found another partner and married for the third time and even that marriage ended in a divorce. She has now married for the fourth time and that marriage, we are told, is still enduring and the couple have a young child. In the meantime, it is clear from the facts that the young girl continued to be in Pondicherry till at least sometime in 1972. The picture from the middle of 1972 to October 1975 is not a very clear one. The trial Court, dealing with the evidence, came to the conclusion that the child was in Ahmedabad during that period and was going to school there. The learned Judge of this Court who dealt with the appeal came to a different conclusion and held that the finding of the trial Court that the child was in Ahmedabad from 1972 to 1975 cannot be accepted.

2. The two respondents in the above circumstances applied under section 7 of the Guardians and Wards Act, 1890, for appointing both of them as legal guardians of the child. Matters came to a head in 1976 when it was insisted that the child should return to Ahmedabad and the respondents were reluctant to part with the child. This seems to have been the immediate cause for the application for guardianship. In the application, only the first appellant was first made a respondent. The mother of the child go

herself impleaded later and also was examined during trial. The evidence in the case consisted mainly of letters which were sent by the mother when she was in the United States as well as the evidence of the second respondent and also the mother of the child, the second appellant.

3. The contention put forward on behalf of the respondents was that the mother had conducted herself in such a way that she had forfeited her legal right to be the guardian of the minor and that in any view of the matter it was not in the interests of the minor child that the minor child should be entrusted with the mother. They also contended that they had been looking after the child with great care and love and have been showering affection on her, that she has been looked after very well, and that she is being educated properly and is going to school. They further contended that the child has been happy in their company and that it would be very much against the welfare of the child if she is taken away from them, and they even went to the extent of saying that an estrangement from them would cause a rude shock to the child which might even affect her mind. There is also evidence to show that the respondents are very much attached to the child and are very eager to have the child with them.

4. These aspects were considered by the trial Court and the Court having entered a finding that the child was in Ahmedabad from 1972 to 1975, dealt with the three aspects that were urged before the Court regarding the incompetency of the mother to be the guardian. Those three aspects were that the mother was leading an immoral life, that she had lost interest in the child and that she was a person who changed her views with facility and without concern for the consequences, on matters relating to the custody of the child, and her welfare. The trial Court came to the conclusion that the mother was not immoral. The Court was of the view that in these days marrying very often and changing one's partner with the agility of a tap dancer was not abnormal and in any case such a conduct cannot spell out immoral conduct. The trial Court also came to the conclusion that the mother continued to have interest in one child and finally it found out reasons for justifying the case with which the mother changed her views regarding the welfare of the child and on questions such as the place when the child should live. On these findings, the trial Court felt compelled to grant the custody and guardianship of the child to the mother. In appeal, the learned Judge felt doubts about the correctness of the finding that the child was in Ahmedabad from 1972 to 1975. In fact, the learned Judge found that the finding entered by the trial Court in that regard holding that the child was in Ahmedabad, was not sustainable. Having found this fact against the contention of the mother and the grandfather, the Judge was apparently unable to make up his mind as to what would be the best interests of the child. The Judge, therefore, decided to ask the child, who was at that time seven years of age, and ascertain its own preferences in the matter, and the child very categorically stated that she would prefer to be with the respondents. She also said uncomplimentary things about the mother, and the child at the time of the interview, at which the mother was also present, in clear terms demonstrated her dislike for the mother. The learned Judge found that the mother is an unfit person to be entrusted with the custody of the minor and that the mother cannot be appointed as the legal guardian. In all the circumstances, the learned Judge felt that the best interests of the child would be served if the custody of the child is given to respondents 1 and 2. The learned Judge was also impressed by the fact that the two respondents got very much attached to the child and the child to them. The result of all the above considerations was a verdict in favour of respondents 1 and 2. What we stated above is a brief summary of the history of this unfortunate litigation.

5. Counsel for the appellant has complained that the preference expressed by the child has been given much weight by the learned Judge and further the learned Judge has even brushed aside other vital considerations in deciding the question. It was also urged that the learned Judge gave too much importance to the attachment of the child to the respondents and their attachment to the child and their claim to have the child with them. Counsel emphasised that the paramount consideration of the welfare of the minor and the legal right of the mother to custody and guardianship, which will be the most important considerations in a case of this type, had not been given prominence by the Judge.

6. This case requires very delicate handling, a difficult task which we shall endeavour to discharge. The members of the family were

living on very good terms at all relevant times and right up to the beginning of 1976. It is clear from the evidence that till the end of 1975, there has been perfect harmony between the respondents and the grand parents, between the mother and the respondents and among all of them and the other members of the family like the brother and sister of the mother. We shall elaborate. The child was willingly and out of choice left with the respondents by the mother. In fact, it was the desire of the mother that the child should be with the respondents and not in Ahmedabad with the grand parents. She had her own reasons for it. Admittedly, the child was with the respondents till June 1972. It appears from the correspondence that the child was then taken from Pondicherry to Ahmedabad and that respondents 1 and 2 accompanied the child. It is not very clear for what length of time the respondents lived in Ahmedabad at that time. But it is more or less certain that they were there for a few months, perhaps as many as five or six. It is said that the first respondent went to school with the child in Ahmedabad having taken a temporary assignment in the school, because when the child was put to school there, she refused to go to school without the first respondent also accompanying her. This evidence has to be taken with a grain of salt, for, in 1972 the child was only just over two years of age. Perhaps she was sent to a baby class. There is no clear evidence. The point to be noted is that during 1972 when the child was in Ahmedabad the respondents were also there. Then the child and the respondents returned to Pondicherry. The child was in Ahmedabad again in 1973, 1974 and even in 1975, and counsel for the appellants is well supported by material which would indicate that the child was in Ahmedabad at least for parts of the year 1973-74 and 1974-75. Here again, we do not get any clear picture excepting the fact that the child was in Ahmedabad for a considerable length of time, not perhaps for the best part of the year in each case, but certainly for a considerable part of the year. But what is significant is that respondents 1 and 2 were also at that time staying in Ahmedabad apparently amicably with the grand parents and all of them were evincing great interest in the child and the child's welfare has loomed large so far as all the relations in India were concerned. In 1975, the child was taken back to Pondicherry with the consent of the grand parents and also with the concurrence of the mother. In these circumstances, we do not think that we should rest our decision on the answer to the question where the child was during the period 1972 to 1975 or for that matter on the finding where the child was since 1975. By the middle of 1975 the child could have been only five years' old and the environments in which she was brought up at the time and the attachments she formed there must have been clearly forgotten by her by now. It is well-known that children of that age will easily forget the surroundings and attachments and they very easily take up to new attachments and new surroundings. There is no evidence as to who looked after the child when she was in Ahmedabad and whether any particular attention was devoted by the grandmother, or the aunt (the sister of the mother) or the uncle (the brother of the mother). But it is clear that they were all staying together and getting on very well with each other till about 1975. It is also seen that after 1975 the mother's sister first and then the mother's brother went down to Pondicherry when the child was not well and was admitted in the hospital, and wanted the child to be taken to Ahmedabad. The grandfather also went down to Pondicherry with the request that the child be taken to Ahmedabad. But the respondents were not willing and the child was not well either. Perhaps the illness was exaggerated by the respondents to see that the child was not taken away to Ahmedabad. Whatever that be, the child continued to be there in Pondicherry till the end of 1975, though by that time the grand parents had expressed their desire to have the child back in Ahmedabad. We must, at this stage refer to the attitude of the mother. The mother in many letters, Exhibits A-1, A-2, A-4, A-7 and A-11, had categorically stated that she wanted the child to be in Pondicherry and not in Ahmedabad. In fact, the change from that attitude took place very much later and the only reason alleged for the change was the alleged behaviour of the second respondent when he went to Ahmedabad in 1975, in not calling at the house of the grand parents to enquire about the illness of the grandmother of the child. This solitary instance alleged by the mother is put forward as a ground for taking the child away from the respondents. But the real reason appears to be the fact that the respondents who got very much attached to the child went about expressing their intention to adopt the child. This was resented by the mother, because she did not want the child to be adopted by the respondents. The reason for this also appears to be

not so much that she wanted to claim the child as her own, but her fear as to what people would say if the child was allowed to be adopted by the respondents. Not only the resented it, but there had been a complete change in her attitude after she came to know about the desire on the part of the respondents to adopt the child and she insisted that the child should live in Ahmedabad. This is the picture that we get about the relationship of the members of the family, an Indian family following the joint family system where three generations live together often amicably perhaps with the bickerings, jealousies, differences and quarrels attendant in such a style of living. Till the end of 1975, this family seems to have got on well each member showing affection and consideration for others, though the relationship between the in-laws and the other members were not very cordial. The unfortunate circumstances under which this child was born and the unfortunate circumstances in which it became necessary for the mother to leave India and get married three times and the consequent separation of the mother from the child and the desire apparently of the grand parents and of the respondents, not to mention that of the mother, and the conviction of each group and the mother that each of those groups and the mother was best suited to look after the child and its interests, have given rise to this litigation which perhaps could have been avoided.

7. In a case of this type, the paramount consideration is the welfare of the child. We shall now try to consider what arrangement would be in the best interest of the minor. From what we have discussed earlier it is clear that the child was at Pondicherry and Ahmedabad from 1972 to 1975. There is no clear picture as to who exactly looked after the child during this period. But the Advocate-General made one point, which impressed, that even during that time when the child was in Ahmedabad, the child continued to be attached to the first respondent and would not even go to the school without the first respondent accompanying her. It is also clear that the second respondent too was in Ahmedabad for practically the entirely of the period in each year when the child was in Ahmedabad. This aspect is not a matter of much importance, because, the child was very young at that time and we should not emphasise that aspect. On the facts of the case we have to come to the conclusion that the child was looked after by the respondents as well as by the grand parents during the periods when she was in Ahmedabad, and for a considerable time durding the period 1972 June to 1975 June the child was in Ahmedabad. It is equally clear and it is undisputed that the child was in Pondicherry after she was taken down from Ahmedabad to Pondicherry by the middle of 1975.

8. In a case of this nature, counsel for the appellants Mr. K. Parasaran is well supported by decisions in his submissions that we should not be carried away by the preference expressed by the child. Perhaps Mr. Parasaran is also well supported in his submission that the learned Judge has allowed himself to be swayed too much by what the child said when she was interviewed by the Judge. The rule in England in such circumstances is that the minor's wishes can be ascertained. But if the minor is below the age of 14 in the case of a boy and below the age of 16 in the case of a girl preference of the child is not of much importance. We do not think that the rule in India is any different. Referring to the English law we shall extract the last portion of paragraph 429 of Halsbury's Laws of England, Third Edition, Volume 21, wherein the law is summarised thus:

> "If the infant is of an age to exercise a choice the Court will take his wishes into consideration. The Court cannot make an order against the wishes of an infant of the age of sixteen years or upwards, unless the infant is a ward of Court".

9. To the first sentence in the above extract there is a footnote which states that "there is no English case which had decided at what age a male infant can exercise a choice, but in Ireland it has been held that he can do so at fourteen years, and that as regards females, the age has been held in England to be sixteen years." This Court had to consider this aspect in a decision reported in *Saraswathiammal* v. *Dharmakotiammal*[1] where Venkatasubba Rao, J., (at page 376) said:

> "If an infant capable of forming an intelligent opinion expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given effect to. In the same

1. (1924) 47 M.L.J. 614: 20 L.W. 902: I.L.R. 48 Mad. 299: A.I.R. 1924 Mad. 873.

way, the age of the child is also an important factor. It seems to be that the rule that fixes an inflexible limit in regard to age is too artificial, and even if the contention is correct (which in my opinion is not) that such a rule obtains in England, I am emphatically of opinion that there is no warrant for the extension of the doctrine to India where different considerations may apply and different conditions do prevail".

10. The learned Judge thereafter referred to two English decisions and expressed the view that the rule that girls over 10 and boys over 14 may be taken to be persons who can express an intelligent preference, cannot be held to have been established by the ruling in *Pollard* v. *Rouse*.[1] The question was not pursued further because the ward in that case was nearly 18 years of age, and the Court took the view that it has got sufficient intelligence and maturity to express its own preference in the matter. The position is clear that the child must be of an age where it can make an intelligent preference. It is unnecessary to go into more case law in the matter excepting to refer to another decision of this Court reported in *Rama Iyer* v. *Nataraja Iyer*[2]. There at page 128 is the following passage:

> "Undoubtedly the minor, after his short stay with his grandfather, has expressed a preference to remain there and his unwillingness to go back to his father. But that we cannot say is an intelligent preference because the boy is under 14 years and as it has been repeatedly held, a child of that tender age cannot be said to be able to form an intelligent preference particularly in a matter relating to his custody as against the wishes of his natural parents."

11. We need not multiply precedents because the matter is now provided statutorily under section 17 (3) of the Guardians and Wards Act, 1890. Section 17, dealing with the considerations that should weigh with the Court in appointing or declaring a guardian of a minor has stated in sub-section (3) that if the minor is old enough to form an intelligent preference the Court may consider that preference. The question would, therefore, always be whether the child is of an age and maturity when it will be able to make an intelligent preference as to where it should be or with whom it should be. Certainly, seven years is too tender an age at which the child would be able to make any intelligent preference. Nor attitude at that time will be governed by the immediate past, the way in which she has been brought up, the immediate attachments and her likes and dislikes at the moment which can easily be swayed either by too much affection or even by too much of intelligence which is not in the interests of the child. The view expressed by the child when she is only 7 years of age ought not, therefore, weigh too much with the Court. We will not also attach much importance to what she said about the mother or even the resentment she showed to the mother. All these are inevitable in the peculiar circumstances obtaining; the child has been moving for nearly three years with the respondents continuously and has been looked after by the first respondent with care and affection and apparently with great love, and the mother during this period had been away and her contacts with the child had been very few and far between and she had almost become a stranger to the child. One cannot expect the child to be friendly with the mother is the above circumstances especially when confronted by the mother in Court in the presence of a Judge. We shall not, therefore, be guided by what the child said at the time of the interview with the Judge.

12. The question then is on what basis are we to decide the very difficult question in this case of custody and guardianship. The statute has provided the guide for, section 17 (1) enacts:

> "In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor."

The same Act under section 19 (*b*) has laid down:

> "Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person—
> (*a*)........

1. (1910) I.L.R. 33 Mad. 288.
2. (1948) 1 M.L.J. 125: 61 L.W. 136: A.I.R. 1948 Mad. 294.

(*b*) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor".

13. At first blush it would appear that there is conflict between the provisions in seciton 17 (1) and that contained in section 19 (*b*). But it has been well-settled that there is no such conflict. It is not as though that in all cases when the father is not unfit to be the guardian, the child should be left with the father. Even in such circumstances the Court will have a discretion in the interest and the welfare of the minor to entrust the child with some other person when circumstances demand it. The position has been clarified by the Supreme Court in the decision reported in *Rosy Jocob* v. *Jacob*[1] at p. 2100. The Court observed:

"The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children —being normally the earning member and head of the family—but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home."

14. The Supreme Court was making those remarks in relation to a dispute that arose between the father and the mother regarding the custody of their minor son. Section 13 of the Hindu Minority and Guardianship Act, 1956, is more specific and has provided in categorical terms in sub-section (2):

(2) "No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor."

Sub-section (2) stated so after having provided in sub-section (1) that the welfare of the minor shall be the paramount consideration in the appointment or declaration of any person as guardian of a Hindu minor. In view of these statutory provisions we have to consider the welfare of the minor. Counsel for the appellants is again well-supported in his submission that even if the welfare of the minor was the paramount consideration, that cannot be the only consideration. Authorities have been cited for this proposition. Reference was made to the decision in In re, *An Infant*[1]. After adverting to section 1of the Guardianship of Infants Act, 1925, which provided that the welfare of the minor infant was the first and paramount consideration, the Court ruled that it was not exclusive and that the Court, while giving special weight to the welfare of the infant, should consider and weigh all the relevant circumstances. The Court also observed that there was no formula by which that could be done and it must ultimately depend on the exercise of a judicial discretion. To the same effect is the decision in In re, *L. (Infants)*[2]. Quoting from the headnote which correctly summarises the data, it is seen that although the welfare of the children was of paramount importance, it was not the sole consideration, that it was undesirable that every mother who was otherwise a good mother should be able to break up the matrimonial home on the assumption that she would be allowed to take her children with her and that the Judge in putting consideration of the mother's conduct on one side, had erred in principle in awarding care and control to her. Accordingly in that case the children were directed to remain as the wards of the Court and their care and control was given to the father with reasonable access to the mother.

15. The only other aspect on which counsel cited authorities was for the position that the attachment that certain persons may develop for the child when the child happened to be with them for some time, must not also have too much weight with the Court in deciding the welfare of the child. Counsel relied on the following passage in In re, *Thain (An Infant)*[3]

"She is nearly seven years old, and from her very earliest infancy down to the present time she has lived with Mr. and Mrs. Jones, and been brought up with their own two

1. (1973) 1 S.C.C. 840: (1974) 2 S.C.J. 129: (1974) 2 M.L.J. (S.C.) 34: (1973) 3 S.C.R 918: A.I.R. 1973 S.C. 2090.

1. (1969) 2 Ch. 238.
2. (1962) 3 All E.R. 1: (1962) 1 W.L.R. 886.
3. (1926) 1 Ch. 676 at 682.

children and as a member of their family. But she is the only child of her father, and as he is now in a position to provide her with a permanent and suitable home, he desires to enforce his right to her control and custody. It is happily a case in which no suggestion of unfitness on either side is involved, and I am satisfied the child will be as well cared for and be the object of as much solicitude in the one home as in the other. In these circumstances, according to well-settled practice, the claim of the father must prevail, unless the Court is judicially satisfied that the welfare of the child requires that the parental right should be superseded."

16. These are well-accepted principles and we have to decide on the guardianship of the girl on the basis of the principles so laid down. Admittedly, the mother, in the absence of the father, as in this case, is the legal guardian. Normally, the mother has got the right to demand that nobody else should be declared the legal guardian of the child, especially in the matter of a girl of tender years, who is just over eight years of age now. The mother is an indispensable element in her life and the Court has to think several times over before severing the natural ties between a mother and her daughter. Unfortunately, in this case such ties had been severed, perhaps irrevocably, but we hope not quite, long back by the conduct of the mother herself. The child was left alone in India when she was not even a year old and she remained away from the mother for all those eight years. The present circumstances of the mother are such that there is no possibility of her coming back to India to settle down in India to look after the child. Not that this is necessary. It may be possible for the child being taken to the United States and taken care of by the mother there. But is there any possibility that this can be done by the mother? The mother has, of course, claimed that she would take the child to the United States. But she has not put forward any practical suggestions regarding this. Her life has been a chequored one to put it very mildly. Her first home was wrecked by no fault of hers. The second and third homes could not be maintained and the fourth home has now commenced, and let us hope that it would continue to be a home for the rest of her life or would it? How can one be certain? It will not be correct or wise or even advisable in a case of this type for us to judge too harshly on the views and ways of the mother, because that too can harm the child and harm the relationship between the mother and child. We, therefore, shall refrain ourselves from saying anything categorical and we shall not be too critical of even express ourselves strongly. We shall use very guarded language. But we cannot help remarking that the mother has clearly demonstrated her intense desire, from which she is unable to extricate herself, of having what she considers to be a full and free life of her own and she had at no time evinced any particular concern for the life and future of the child or its welfare. If she has any concern for these matters—we suppose she as a mother would have such considerations—she had not allowed those considerations to stand in the way of having her own life in as free, gallant and cavalier a fashion as her whims and fancies indicated. That is an unusual attitude on the part of any mother, particularly an Indian mother, brought up according to Indian traditions. Her life has been an adventurous one quite abnormal, for any woman and much more so for an ordinary Indian woman. But it is not for us to sit in judgment on this attitude of hers. But we advert to them only to show the attitude of the mother towards the child and in connection with the question of the welfare of the child if entrusted to her. In the United States it is a well-known fact, of which we can take judicial notice, that it is very difficult to bring up a child, particularly when the child is to be brought up in a house where both the husband and the wife are working. The mother too is now admittedly working. Perhaps it is necessary for her to continue to work. The husband is not the father of the child He has got his own child by the mother. How far the atmosphere there will be conducive for the Indian child that had not seen her mother for eight years, is a problematical one. In these circumstances, to entrust the child with the mother would be a very hazardous venture on which no one should attempt to launch upon. We have, therefore, to negative the claim of the mother when she claims that she should be allowed to take the child away, basing her claim mainly, if not solely on her legal right, as the guardian of the minor child. Counsel for the appellants to some extent realised the difficulty of sustaining the case of the mother that she should be allowed to have the child with her, and, therefore put forward an alternative case, without prejudice to the claim of the mother that she must be given the

child, that the grandfather must be given the child, that the grandfather must be entrusted with the child. From all accounts the grand-parents were attached to the child. The family in Ahmedabad is a joint family. The mother never liked the atmosphere there. She has been apprehensive of the in-laws by the first marriage claiming the child or taking it away. The child was in Ahmedabad for long spells till the end of 1975. The mother had said repeatedly in the letters that the child should be in Pondicherry. She went to the extent of saying that the child should be given to the respondents. She must then have had so much of confidence in the respondents and so much of lack of confidence in the child being in Ahmedabad. There have been confrontations in the family at Ahmedabad too. There was a daughter-in-law who was not able to get on well with the other members of the family. There is a daughter who is likely to get married. The grandmother has not been doing well. The grandfather is a businessman and well past 60. Hence he is not best suited to look after a young girl eight years old. The girl must have the company of an elderly woman who will look after its interest. There is none such in Ahmedabad to look after the interest of the child.

17. In view, of the circumstances that prevail in Ahmedabad, that cannot be served by entrusting the child to the grand-parents. After all, thegr and-parents have no legal right or claim, though they are in proximity of relationship nearer to the chlid than the respondents. But the respondents are not strangers either. They are certainly closely related. They have no other encumbrances. They have got sufficient means. They are very fond of the child. Nobody has suggested that they would not care for the interest of the child. In these circumstances, we have to uphold the decision of the learned Judge that the child must be left with the respondents.

18. Any arrangement in a matter of this type can only be a temporary measure and cannot be a final one, not even final till the child reaches the age of discernment, which would be many years hence, for circumstances can change. We therefore make it clear that the order passed now is subject to modifications on cause being shown for such change. It would therefore be open to the parties to approach this Court for any directions or even change of custody of the child if reasonable compelling and supervising events justify such a course being adopted.

Another aspect we should clarify is the provision for the mother and other relatives for access to the child for after all, a natural mother can be never substituted whatever may be said against themother. The child may feel one day, if her ties with the mother are rent asunder for ever, that injustice had been done to her Any direction that we give, therefore, must have this aspect in mind. We have, therefore, provided access for the mother to the child. We must also provide access for the grand parents to the child. We thought that it may be possible for the respondents to come to some workable arrangements with the mother and grand-parents even when the case had reached the stage of final decision, and expected a compromise in regard to the custody of the child, so that all may take interest in the child and the child may get to know the grand-parents and other relations, particularly the mother well, so that she will grow up in a very healthy atmosphere, which is necessary and conducive to the development of a healthy and balanced personality; only we are happy to note that the Advocate-General appearing for the respondents stated before us that the mother will be welcome to visit the child whenever she comes to India and that the respondents would be willing to allow her to stay with them and the child to enable the mother to create a relationship of love and affection between the mother and daughter. We consider that the respondents must provide opportunities to the other relations such as grand-parents, uncle and aunt of the child, to visit the child and spend time with her. In all the circumstances and the past history and relationship of the relatives with the minor considerations may arise whether it would be necessary and desirable to take the minor to Ahmedabad. Provision will have to be made for this contingency also.

19. In the light of the above discussion we uphold the discretion exercised by the learned Judge in the Judgment under appeal that the respondents must be appointed as the legal guardians of the minor.. We further give the following directions:

1. It would be open to the mother to visit the child at Pondicherry whenever she wants. On those occasions the mother will be the guest of the respondents and will stay with them and

the minor. The respondents would do everything in their power to make such visits pleasant and happy.

2. In circumstances when the mother has compelling reasons to take the child to Ahmedabad during her visit to India, she may move this Court for directions. If a strong case is made out for that, the Court will give directions in that regard. Such orders will be passed only if it is in the interests of the child to be taken to Ahmedabad. And if such a direction is given the child will have to be accompanied by the respondents. The child, if taken to Ahmedabad, must be with the grand-parents and grand-parents only and the respondents must be permitted to live in the same house with the minor and not separately from her.

3. The grand-parents and the uncle and aunt are permitted to visit the child in Pondicherry.

4. This Court may be moved by the appellants and the respondents for any directions as are considered just and necessary in the interest of the minor.

20. We must leave it to the mother, the respondents who appear to love the child very much, and the other close relations like the grand-parents to work out satisfactory arrangments for the welfare of the minor. Only their good will tolerance and attachment to the child which we feel still exists can solve the difficult situation. It would be a good gesture on the part of the respondents to invite the mother periodically to stay with them and also invite the other near relations referred to above to visit the minor. The mother and other relations should not attempt to take the child out without the consent of the respondents and should take care not to harm the relationship in any manner. The mother should not approach this Court for taking the minor to Ahmedabad without special and compelling reasons and there must be no disruption of the studies of the minor. It is not possible to deal with or anticipate the probable problems that can arise in an extraordinary situtation such as that obtaining in the case and we can only conclude by repeating what we have indicated that goodwill and real consideration for each other and the paramount consideration of the welfare of the minor would solve all problems and we expect the relations including the mother and the respondents to act and conduct themselves in a reasonable, fair and considerate manner having in mind only the welfare of the minor.

21. We dispose of this appeal in these terms We direct the parties to bear their own costs throughout.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE. AT MADRAS.

PRESENT:—*M.M. Ismail and S. Nainar Sundaram, JJ.*

Panthanam Ammal and others .. *Appellants**

v.

K. Srinivasa Ayyangar, and Sons through one of its partners S. Krishnaswamy .. *Respondent.*

(A) *Tamil Nadu Debt Relief Act (XXXVIII of 1972), sections 7 and 15—Decree passed on 24th February, 1964—Act published on 15th December, 1972 — Application by judgment-debtor under sections 7 and 15 of the Act filed on 24th October, 1975—Application whether barred by limitation—No distinction or discrimination between application filed by a decree-holder and application filed by a judgment-debtor—Application held barred.*

(B) *Construction of statutory provisions—Absence of comma before the word "six months" (and after the word "wilful") in section 15 (1)—Effect—Punctuation mark has no controlling effect.*

Section 15 (1) of the Tamil Nadu Debt Relief Act, 1972 clearly shows that that section prescribed a period of limitation of six months for filing an application under that provision for amendment of a decree passed before the publication of the Act. There is absolutely nothing in the section or in the Act to indicate as to why there should be a discriminating treatment between an application filed by a judgment-debtor and an application filed by a decree-holder. On the other hand, a perusal of the different provisions of the Act shows that it is the scheme of the Act itself which provides a period of six months as the period of limitation for a judgment-debtor to file an application. Sections 14 and 18 of the Act expressly state that an application by a judgment-debtor has to be made within a period of six months from the date of the

*A.A.A.O. No. 74 of 1977. 20th *April,* 1978.

publication of the Act. In such a context, the question is, whether there is any justification for making a departure from this scheme with reference to an application to be filed by a judgment-debtor under section 15 of the Act, whether there is anything special or unique in section 15 to compel the Court to take a view that with reference to that section, the period of limitation prescribed therein will apply only to an application filed by a decree-holder and will not apply to an application filed by a judgment-debtor, though the application filed by both may be for the same relief. There is absolutely no rational basis for making a distinction between an application filed by a judgment-debtor and an application filed by a decree-holder under Section 15 of the Act, and to provide for a period of limitation of six months, only for an application to be filed by a decree-holder. [*Para.* 3.]

View of *N.S. Ramaswami, J.* in C.R.P. No. 1106 of 1974, (1974) T.L.N.J. 378, not approved. View of *Balasubrahmanyan, J.* in C.M.A. No. 596 of 1975, (1978) 2 M.L.J. 447, approved

All the text book writers are of the unanimous view that a punctuation mark cannot have a controlling effect in the construction of a statutory provision though it may be of some assistance in the case of ambiguity. So long as the language is clear and the purport of the statutory provision in unambiguous, the absence or presence of a punctuation mark cannot have the effect of distorting the statutory provision. [*Para.* 6.]

Cases referred to:

V. Ramakrishnan v. *Kandaswami Thevar,* 1974 T.L.N.J. 378; *C. Annamalai* v. *Saraswathi Ammal,* (1978) 2 M.L.J 447: 91-L.W. 642; *Maharani of Burdwan* v. *Murtunjoy Singh,* (1886) 14 I.A. 30: I.L.R. 14 Cal. 365; *Aswini Kumar Ghose* v. *Arabinda Bose,* 1952 S.C.J. 568: 1953 S.C.R. 1: A.I.R. 1952 S.C. 369; *Stephenson* v. *Taylor,* (1861) 1 B. and S. 101; *Regina* v. *Governor of Brixton Prison,* Ex parte *Narayan Singh,* (1962) 1 Q.B. 211; *Bijibai Salodhana* v. *Rama Manohar Thamu Mishra,* A.I.R. 1969 Bom. 103; *Dr. N. Natesan* v. *Mrs. S. Santhalakshmi,* (1971) 2 M.L.J. 164; *Mahendrakumar Ishwarlal and Co.,* v. *Union of India,* (1973) 91 I.T.R. 101.

Appeal against the order of the Court of the I Additional Subordinate Judge, Madurai, dated 11th August, 1977 and made in C.M.A. No. 88 of 1977 (C.M.A. No. 20 of 1977 District Judge, Madurai) I.A. No. 769 of 1975 in O. S. No. 26 of 1964 Principal District Munsif Madurai Town.

P. Ananthakrishnan Nair, for Appellants.

K. Sankaran, for Respondent.

The Judgment of the Court was delivered by

Ismail, J.—This Civil Miscellaneous second appeal arises out of the order of the learned I Additional Subordinate Judge of Madurai, dated 11th August, 1977 made in C.M.A. No. 88 of 1977 on his file reversing the order of the learned Principal District Munsif of Madurai Town, dated 21st April, 1976 made in I. A. No. 769 of 1975 filed under sections 7 and 15 of the Tamil Nadu Debt Relief Act, 1972, Tamil Nadu Act XXXVIII of 1972, hereinafter referred to as the Act. The Act was published in the Tamil Nadu Government Gazette on 15th December, 1972. Sub-section (1) of section 7 of the Act stated that where any debtor has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged. This is a benefit conferred on a debtor to enable him to scale down the debt due by him. Section 15 of the Act dealt with cases where decrees have been passed before the publication of the Act and it made provision for giving the benefit to a judgment-debtor even after the decree has been passed. Sub-section (1) of section 15 of the Act without the proviso reads as follows:

> "Where before the publication of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is a debtor within the meaning of this Act, or in respect of a Hindu joint family debt, on the application of any judgment-debtor who is a debtor within the meaning of this Act, or in respect of a Hindu joint family debt on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder within six months from the date of publication of this Act, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (Central Act V of 1908), amend the decree accordingly or enter satisfaction, as the case may be".

In the present case the decree was passed on 24th February, 1964 and the Act was published, as already pointed out on 15th December, 1972 and the application under sections 7 and 15 of the Act was filed on 24th October, 1975. The learned Principal District Munsif allowed the application of the appellants herein but on appeal preferred by the respondent herein, the learned I Additional Subordinate Judge of Madurai, dismissed the said application on merits. Hence the present appeal by the legal representatives of the judgment-debtor questioning the correctness of the order of the learned Principal Subordinate Judge on merits.

2. However the learned counsel for the respondent raised a preliminary objection that the application filed by the appellants herein before the learned District Munsif was barred by limitation and that therefore there was no question of this Court going into the merits of the order or the claim of the appellants herein. Consequently we have necessarily to consider the question whether the application filed by the appellants herein on 24th October, 1975 was barred by limitation or not.

3 A reading of section 15 (1) of the Act, which we have extracted already, will clearly show that that section prescribed a period of limitation of six months for filing an application under that provision for amendment of the decree. However the learned counsel for the appellants contended that the period of limitation of six months prescribed in that section would apply only to an application filed by a decree-holder for amendment of the decree and that would have no application whatever to an application filed by a judgment-debtor, as contemplated by that section. In support of this contention, the learned counsel relied on a decision of N.S. Ramaswami, J., *V. Ramakrishnan* v. *Kandaswami Thevar*[1] as well as the absence of a comma after the word "decree-holder" and before the word "wilful" in that section. The judgment of N.S. Ramaswami, J., fully supports the contention of the learned counsel for the appellants The learned Judge after extracting the section observed:

"On behalf of the decree-holder it is contended that the period of six months mentioned in the above section applies to an application not only by the decree-holder but also by a judgment-debtor. But a true grammatical construction of the section would go to show that the clause within six months from the date of publication of this Act applies only to an application of the decree-holder and not to an application by a judgment-debtor or a member of a joint family. The significant fact to be noted is that after the words, 'on the application of a decree-holder' there is no comma. That means the subsequent clause 'within six months from the date of publication of this Act' has to be tacked on to the clause 'on the application of the decree-holder' and the said six months period would not be attracted to the earlier clause in the said section which deals with applications by judgment-debtors or by the members of a joint family in case of joint family debts."

However Balasubrahmanyan, J., who had occasion to consider this question in his judgment dated 23rd March, 1978, in C.M.A. No. 569 of 1975 (*Annamalai and two others* v. *Saraswathi Ammal and another*[1]) differed from the view of N.S. Ramaswami, J., and according to Balasubrahmanyan, J., the normal construction of the provision does not make a distinction or discrimination between an application filed by a judgment-debtor and an application filed by a decree-holder and the absence of a comma cannot be relied on for imputing any such discrimination to the legislature. It is in the context of these two decisions that we have to consider what exactly is the correct construction of section 15 (1) of the Act. We are of the opinion that the view taken by Balasubrahmanyan, J., is correct and the view taken by N.S. Ramaswami, J., does not represent the true legal position. In our view, there is absolutely nothing in the section or in the Act to indicate as to why there should be a discriminating treatment between an application filed by a judgmant-debtor and an application filed by a decree-holder. On the other hand, a perusal of the different provisions of the Act will show that it is the scheme of the Act itself which provides a period of six months as the peried of limitation for a judgment-debtor to file an application. Section 14 of the Act contains provisions as to costs in certain cases. Sub-section (1) of that section states:

"Where a decree is passed against any debtor in a suit instituted on or after the 1st March, 1972, the Court shall allow only such costs as would have been allowable if the suit had been filed for the amount of the debt

1. (1964) T.L.N.J. 378.

1. (1978) 2 M.L.J. 447: 91 L.W. 642.

as scaled down in accordance with the provisions of this Act, and where in any such case a decree has been passed before the publication of this Act the Court shall on application by the judgment-debtor within six months from the publication of this Act, amend the decree accordingly."

Section 18 of the Act contains some special provision in the case of certain sales of movable property and the section states:

"Where in execution of any decree, any movable property of any debtor has been sold on or after the 1st March, 1972, any judgment-debtor may, within six months from the publication of this Act, apply to the Court for an order that the provisions of section 7 and of sections 10 and 11 be applied to the decree, and the Court, shall if satisfied that the applicant is a debtor entitled to the benefits of those sections, apply the same and order the decree-holder to refund any sum received by him on or after the 1st March, 1972, in excess of the amount to which he would have been entitled if the property had not been sold."

Thus it will be seen that sections 14 and 18 of the Act expressly state that an application by a judgment-debtor has to be made within a period of six months from the date of the publication of the Act. In such a context, the question that arises for consideration is, is there any justification for making a departure from this scheme with reference to an application to be filed by a judgment-debtor under section of the Act. In other words, is there anything special or unique in section 15 in order to compel the Court to take a view that with reference to that section, the period of limitation prescribed therein will apply only to an application filed by a decree-holder and will not apply to an application filed by a judgment-debtor, though the application filed by both may be for the same relief. In our view, there is absolutely no rational basis for making a distinction between an application filed by a judgment-debtor and an application filed by a decree-holder under section 15 of the Act and to provide for a period of limitation of six months, only for an application to be filed by the decree-holder. It may also be pointed out that if the argument of the learned counsel for the appellants is to be accepted, there will be no period of limitation whatever for an application to be filed by a judgment-debtor.

4. There is another interesting feature which can be noticed in this context. As section 15 (1) of the Act talks of an application both by a judgment-debtor and by a decree-holder for amendment of a decree, we asked the learned counsel appearing for both sides to indicate even a single case in which a decree-holder may conceivably file an application for amendment of the decree under that section. Except for stating that a well meaning and well intentioned decree-holdor, with a view to benefit the judgment-debtor in accordance with the provisions of the Aet, may file an application for an amendment of the decree, they represented that no other application by a decree-holder can even be conceived. If that be the case, could it have been the intention of the legislature that in a rare case where an application is filed by a decree-holder for the benefit of the judgment-debtor there should be a period of limitation, but in a case where a judgment-debtor files an application for his own benefit, there should be no period of limitation whatever? We are unable to hold that the legislature could have intended any such consequence, particularly in view of the general practice that when a benefit is conferred on a person and that person is also given a remedy for the purpose of enforcing that benefit, the legislature prescribes a period of limitation only for that person to enforce the benefit. Therefore merely as a matter of construction of the statutory provision as it is we are not able to find any rational basis for making a discrimination between an application filed by a judgment-debtor and an application filed by a decree-holder in providing a period of limitation only for the application filed by the decree-holder and not for the application filed by the judgment-debtor.

5. Independent of the above view of ours on the language of the section read in the context of the scheme as well as the object of the Act, we are of the opinion that no reliance can be placed on the absence of a comma, as has been done by N.S. Ramaswami, J., for coming to the conclusion that the provision dealing with limitation is meant to be applied only to an application filed by a decree-holder.

6. All text-book writers are of the unanimous view that a punctuation mark cannot have a controlling effect in the construction of a statutory provision though it may be of some assistance in the case of ambiguity. So long as the language is clear and the purport of the stautory provision in unambiguous, the

absence or presence of a punctuation mark cannot have the effect of distorting the statutory provision.

7. It is stated in "Maxwell on the Interpretation of Statutes" Twelfth Edition at page 14 as follows:—

> "Where it is necessary to give a provision a particular construction which is at variance with the way in which the section is punctuated, it may be read as though there were in fact punctuations where none appears on the face of the Act."

8. The position has been more clearly explained by Crawford in "Statutory Construction—Interpretation of Laws" at pages 342-343 as follows:

> "Of course, the punctuation of a statute may lend some assitance in its construction, but when the intention of the statute and the punctuation thereof are in conflict, the former must control, even where the punctuation is regarded as a part of the statute. In other words, the punctuation will not control the plain meaning of the text of an enactment. It is subordinate to the text, and the retention of a word is of far more importance than the position of a comma. Indeed the Court may punctuate or disregard existing punctuation, or repunctuate in order to give the legislative intention effect".

Though there had been a particular view in England before 1850, since when punctuation marks started appearing in statutes, still even the English Courts did not hold that the punctuation marks controlled the meaning of a statute. In every case the intention must be gathered from the context to which the words relate and the presence or absence of a punctuation mark cannot conclusively determine the meaning of the statute. The Courts in this country have consistently taken this view.

9. The Judicial Committee of the Privy Council in *Maharani of Burdwan* v. *Murtunjoy Singh and others*,[1] observed:

> "But their Lordships think that it is an error to rely on punctuation in construing Acts of the Legislature".

10. The Supreme Court in *Aswini Kumar Ghose and another* v. *Arabinda Bose and another*[2] had to consider the scope of section 2 of the Supreme Court Advocates (Practice in High Courts) Act, 1951. The relevant provision which the Supreme Court had to consider was:

> "Notwithstanding anything contained in the Indian Bar Councils Act, 1926, or in any other law regulating the conditions subject to which a person not entered in the roll of Advocates of a High Court may be permitted to practise in that High Court every Advocate of the Supreme Court shall be entitled as of right to practise in any High Court whether or not he is an Advocate of that High Court".

The contention and the reasoning are dealt with in the following observations of B.K. Mukherjea, J:

11. "The contention of Mr. Ghosh is that on a proper construction of the language of the clause, the whole of the Bar Councils Act and not merely those provisions in it, which relate to disabilities attaching to Advocates of other High Courts, must be deemed to be eliminated, so that the right of practising that is conferred by the section is to be exercised without the restrictions or limitations flowing from any of the provisions of the Bar Councils Act. In support of his contention that the whole of the Bar Councils Act is excluded by the opening clauses Mr. Ghosh lays great stress on a comma, which separates the Bar Councils Act and the figures and words that follow, from the expression 'or in any other law' which comes immediately after that.

12. He says further that under the ordinary rules of interpretation the adjectival phrase 'regarding (*sic*) the conditions etc.' should be taken to apply to the word or phrase immediately preceding it and not to the remoter antecedent term or expression. These arguments, though they have an air of plausibility about them, do not impress me much. Punctuation is after all a minor element in the construction of a statute, and very little attention is paid to it by English Courts. Cockburn, CJ. said in *Stephenson* v. *Taylor*.[1] On the Parliament Roll there is no punctuation and\ we therefore are not bound by that in the printed copies'. It seems, however, that in the vellum copies printed since 1850 there are some cases of punctuation, and when they occur they can be looked upon as a sort of *contemporanea expositio* see Craies on Statute Law, page 185 when a statute is carefully punctuated and there is doubt about its

1. (1886) 14 I.A. 30: I.L.R. 14 Cal. 365.
2. 1952 S.C.J. 568: 1953 S.C.R. 1: A.I.R. 1952 S.C. 369 at 383.

1. (1861) 1 B. & S. 101.

meaning, weight should undoubtedly be given to the punctuation, vide Crawford on Statutory Construction, page 343. I need not deny that punctuation may have its uses in some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text (ibid)".

13. A similar question arose in *Regina* v. *Governor of Brixton Prison Ex. parte Naranjan Singh*[1] referred to by Balasubrahmanyan, J., in his judgment to which we have drawn attention. That case involved the construction of section 10 of the Fugitive Offenders Act, 1881 and that section read as follows:

"Where it is made to appear to a superior Court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive either absolutely or on bail or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Court seems just".

The rival interpretations of that section concerned the meaning in the context of the words "or otherwise", and that controversy arose in view of the absence of a comma, after the words "interests of justice". Lord Parker, CJ., took the view that the Court's discretion to discharge a fugitive could be exercised in any case in which the return of the man would be unjust or oppressive, or too severe, and it was not confined to a case in which the application appeared not to have been made in good faith. The Court rejected the contention based on the absence of the punctuation mark, namely, a comma, in between the words "in the interests of justice," and "or otherwise".

14. Before the Bombay High Court in *Bijibai Saldhana* v. *Rama Manohar Thannu Mishra and another*[2] a similar argument based on the absence of a comma was advanced and the Court held that it was well-known that punctuation could not be regarded as a controlling factor and could not be allowed to control the plain meaning of a text.

15. Similar argument was aduanced before this Court (Ramanujam, J.) in *Dr. N. Natesan* v. *Mrs. S. Santhalakshmi*[1]. In that case the argument turned upon the definition of the term 'tenant' contained in section 2 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. That provision defined the tenant as meaning "any person by whom or on whose account rent is payable for a building and includes the surviving spoese, or any son, or daughter, or the legal representative of a deceased tenant, who had been living with the tenant in the building as a member of the tenant's family upto the death of the tenant." The argument that was advanced in that case was that because there was a comma after the expression "surviving spouse" and before the expression "or any son or daughter" even the son or daughter or a tenant would be deemed to be a tenant for the purposes of the Act. Ramanujam, J., rejected that contention. The learned Judge observed:—

"I am of the opinion that the definition will only take in sons or daughters or the legal representatives of the tenants only after the death of the tenant and not when the tenant himself is alive. To construe otherwise will lead to considerable absurdities and anomalies. Even when the tenant is alive if his sons and daughters are to be treated as tenants, there will be more than one tenant in respect of the same building and they may independently seek the protection of the Act in respect of the same building. If the statute, intended to confer a benefit also on the other members of the tenant's family it could have specifically stated so. I am not inclined to agree with the learned counsel for the respondent that the punctuation between the words "surviving spouse" and "or any son and daughter" showed that the word 'surviving' qualified only spouse and not the son and daughter. The punctuation though regarded as a guide for the interpretation of a statutory provision, it cannot be conclusive. Odgers in his 'The Construction of Deeds and Statutes', 4th Edition, page 249 says.

'The title, marginal notes and punctuation in a statute are regarded merely as *contemporanea expositio* "which though useful as a guide to a hasty inquirer" ought not to be relied upon in construing an Act of Parliament'.

1. (1962) 1 Q.B. 211.
2. A.I.R. 1969 Bom. 103.

1. (1971) 2 M.L.J. 164.

Maxwell 'on the Interpretation of Statutes' at page 14 of the 12th Edition also points out that:

"Where it is necessary to give a provision a particular construction which is at variance with the way in which the section is punctuated, it may be read as though there were in fact punctuations where none appears on the face of the Act."

Though punctuation can be regarded as a kind of *contemporanea expositio* it cannot be treated as forming part of the statute itself.

16. Lastly, Ramaprasada Rao, J., as he then was, had to deal with the question in relation to section 139 (1) of the Income-tax Act, 1961 in *Mahendrakumar Ishwarlal & Co., and others* v. *Union of India and others*.[1] In that case the learned Judge observed:

"Even on the question whether the punctuation adopted in sub-clauses (*a*) and (*b*) gives a guide to the interpretation put upon it by the learned counsel for the petitioner, I am inclined to agree with him. No doubt, for historic reasons, English Courts were chary to be guided by punctuation marks in statutes as no preliminary rule contained any punctuation. But in an enactment like the Indian Income-tax Act, where meticulous care has been taken to punctuate the provisions and the sections contained therein, it would not be inappropriate if such a punctuation of a particular provision is also taken into consideration for purposes of interpreting the relevant provision. This is on the principle of *contemporanea expositio*."

Thereafter the learned Judge extracted a passage from the judgment of the Supreme Court in *Aswini Kumar Ghose and another* v. *Arabinda Bose and another*[2] which we ourselves have already extracted.

Having regard to the above general principles, we are not able to hold that on account of the mere absence of a comma before the expression "six months" the period of limitation of six months prescribed in section 15 (1) of the Act applies only to an application by a decree-holder.

17. Apart from the general principles referred to above, we are not able to discern any rational basis or justification whatever for the Legislature making a distinction between an application filed by a decree-holder and an application filed by a judgment-debtor and hence we are unable to attribute any intention to make such a discrimination to the Legislature. As we have pointed out already, if the contention put forward on behalf of the appellants is to be accepted, the result will be that there will be no period of limitation for a judgment-debtor to file an application under section 15 (1) of the Act, while there will be a period of limitation for a decree-holder to file an application, for which discrimination no justification is conceivable or discernible.

18. Under these circumstances, we are unable to share the view expressed by N.S. Ramaswami, J., and we hold in the present case that the application in question filed by the appellants herein, which was admittedly beyond six months from the date of the publication of the Act, namely, 15th December, 1972 was clearly barred by limitation and hence liable to be dismissed. Accordingly the appeal fails and is dismissed. There will be no order as to costs.

R. S. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and S. Nainar Sundaram JJ.*

The Deputy Managing Director (Tech) Indian Airlines, "Airlines House", New Delhi and others .. *Appellants**

v.

W.B. Correya .. *Respondent.*

(A) *Constitution of India* (1950), *Article* 226—*Employer and employee—Domestic enquiry against employee—Charge of misconduct—Witnesses examined at preliminary enquiry—Statements recorded not put to witnesses at the time of regular enquiry—Value of cross-examination—Natural justice violated—Orders of employer removing employee quashed.*

(B) *Standing Orders in Annexure IV to the Air Lines Corporation Employees Service Rules and Establishment Orders, Regulation* 27—*Scope.*

It was not in dispute that a statement given by a witness at the preliminary enquiry could

1. (1973) 91 I.T.R. 101.
2. 1952 S.C.J. 568: A.I.R. 1952 S.C. 369.

*W.A No. 505 of 1976. *3rd July, 1978*

be made use of in a regular enquiry. But before that could be made use of, certain conditions should be fulfilled. It was not necessary that the witness should read out the statement itself or parrot-like repeat what he had stated therein. But, he should at least affirm the contents of the statement by stating that, he made the statement and he stood by its contents. [*Para.* 6.]

If the statement was not put to the witness and he had not been given an opportunity to affirm the same, there was in fact no evidence of that witness in the course of the chief examination at all and it was very doubtful whether such a statement notwithstanding copies thereof had already been furnished to the worker, could be used as substantive evidence against the worker concerned. [*Para.* 7.]

The principal aims of cross-examination are to destroy material particulars of the evidence-in-chief, to weaken the evidence where it cannot be destroyed, to elicit new evidence helpful to the party cross-examining and to undermine the witness or shake his credit by showing that he cannot be trusted to speak the truth or that he is deposing, however honestly, to matters of which he has no real knowledge. Cross-examination was the most effective and efficacious test which law had devised for the discovery of truth. Consequently any impairment of this right whether deliberately or accidentally, would have the effect of preventing a person who cross-examines from establishing the truth. [*Para.* 8.]

If a witness had made a contemporaneous record of what he has seen or heard, the same can be used for refreshing his memory in the course of his giving evidence. A statement made by him at the stage of a preliminary enquiry is not however a record made by him of what he saw or heard contemporaneously. Where statements had been taken from certain persons before the regular enquiry behind the back of the person accused of certain acts or misconduct and those persons were called as witnesses at the regular enquiry but without putting such statements to them or asking them whether the contents of such statements were made by them and whether they stood by them, copies of such statements were found in their hands when answering questions put during cross-examination, the enquiry is contrary to the well-established principles that have to regulate proceedings before any judicial or quasi-judicial authority and even in a domestic inquiry. [*Paras.* 9, 5.]

Under Regulation 37 of the Standing Orders (Regulations) in Annexure IV relating to Air Lines Corporation Employees' Service Rules and Establishment Orders, where the person accused of certain acts or misconduct did not admit the charges in his *Explanation*, the moment the Enquiry Officer called the witnesses produced by the management in the instant case he had to examine them on the points not admitted by the respondent and allow them to be cross-examined. Failure to do so renders the impugned order liable to be quashed. [*Para.* 11.]

Cases referred to:—

State of Mysore v. *Shivabasappa Shivappa Makapur*, (1963) 2 S.C.R. 943: (1963) 2 S.C.J. 104: A.I.R. 1963 S.C.375; *Khardah and Company Ltd.* v. *The Workmen*, (1964) 3 S.C.R. 506: (1965) 1 S.C.J. 97· A.I.R. 1964 S.C. 719; *M/s. Kesaram Cotton Mills Ltd.* v. *Gangadhar*, (1964) 2 S.C.R. 809: (1965) 1 S.C J. 71: A.I.R. 1964 S.C. 708; *Central Bank of India Ltd.* v. *P.C. Jain*, (1969) 1 S.C.R. 735: (1969) 2 S.C.J. 583: (1969) M.L.J. (Crl.) 748: A.I.R. 1969 S.C. 983.

Appeal under clause 15 of the Letters Patent against the order dated 2nd July, 1976 of Mr. Justice Ramanujam and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 4153 of 1974, presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with the Order dated 22nd April, 1974 in No. HPDO 1/02721 and passed by the Deputy Managing Director (Technical) Indian Airlines, Airlines House, New Delhi confirming the order of removal passed against the petitioner by the Director of Operations, Indian Airlines, Airlines House, New Delhi, in his Proceedings dated 7th February, 1974 in HPDO. 1/02721 and quash the order dated 22nd April, 1974.

G.B. Pai for *C. Ramakrishna*, *N.G.R. Prasad* and *M. Shakir Ali*, for Appellants.

R. Nadanasabapathi, for Respondent.

The Judgment of the Court was delivered by

Ismail, J.—This is an appeal by the respondents in W.P. No. 4153 of 1974 against the judgment and order of our learned brother Ramanujam, J., dated 22nd July, 1976, allowing the Writ Petition and quashing the orders of the first and second appellants herein. The

facts are within a very short compass. The respondent herein was employed as Flight Steward in the Madras Branch of the Indian Airlines. On 24th July, 1973, the following three charges were framed against him in respect of his alleged conduct in Operations Offices and Departure Lounge on 19th July, 1973:—

(*i*) "even though not on duty, he was found in the above offices appearing to be under the influence of liquor;

(*ii*) he behaved in a rude, indecent and abusive manner towards Capt; N.M. Pereira Officiating Operations Manager, by talking to him in an aggressive and threatening manner; and

(*iii*) he created a scene in the Departure Lounga, where passengers were seated, by shouting and using abusive and threatening language towards Capt. Pereira.

According to the management. the conduct which constituted the subject-matter of the said three charges, was in violation of the Standing Orders (Regulation) 16 (11), 16 (13) and 16 (18), a mistake for 16 (8). By the said charge memo, the respondent was asked to give his *Explanation* to the said three charges. It is not necessary to refer to the subsequent correspondence that passed between the respondent and the management in view of the narrow compass within which this appeal lies. It is enough to point out that finally an enquiry was conducted by one Thiru R.R. Singh into the charges. After the conclusion of the enquiry, the Enquiry Officer submitted his report to the effect that all the three charges had been proved. On the basis of the said findings, a notice dated 14th December, 1973 was issued to the respondent herein asking him to show cause why he should not be removed from service. The respondent submitted his representation to the show cause notice on 5th January, 1974. However, by an order dated 7th February, 1974 the conclusion of the Enquiry Officer was confirmed and the second appellant removed the respondent from service. Against the said order of removal the respondent appealed to the Assistant Managing Director, Indian Airlines, New Delhi, who by an order dated 22nd April, 1974 dismissed the appeal holding that the action taken by the second appellant was justified. The respondent thereafter filed W.P. No. 4153 of 1974 on the file of this Court praying for the issue of a writ o *certiorari* to quash the orders of removal passed against him.

2. We shall refer to some of the main points of attack against the orders made by the respondent a little later. One of the points taken by the appellants herein was a preliminary one in the sense that no petition for the issue of a writ of *certiorari* will lie against the orders of appellants 1 and 2. The learned Judge overruled that objection and held that the writ petition was maintainable, Before us in this appeal that objection was not urged and, therefore, we are not concerned with that preliminary objection and we are concerned only with the case on merits.

3. As far as the merits are concerned, the respondent herein in the writ petition impugned the validity of the orders passed by the appellants herein on several grounds. The very first ground put forward as Ground No. 1 in the affidavit filed in support of the writ petition is:—

"Admittedly a preliminary enquiry was conducted behind the back of the petitioner. In the regular enquiry which was conducted on 4th October, 1973 and on the subsequent dates, no witness produced by the department was examined-in-chief by the department. All the witnesses produced by the department were having their prior statements recorded to the preliminary enquiry. The petitioner was straightaway asked to cross-examine the witnesses with relation to the statements given by these witnesses in the preliminary enquiry. The petitioner orally objected, but his objection was overruled by the enquiry officer. That the witnesses were having in their hands the statements recorded in the preliminary enquiry is abundantly made clear in the enquiry proceedings. In answer to a question put by the petitioner, Capt. N. M. Pereira has stated that 'it is all given in para 2 of my statement'. At one time when a question was put by the petitioner to Capt. S. L. D' Souza the enquiry officer advised the petitioner that the question did not arise from the statement of Shri D' Souza and therefore it was not considered relevant. All these would go to show that the departmental witnesses never gave any statement of their own in the regular enquiry. Therefore the whole enquiry, the report based on that enquiry and the punishment based on the enquiry report are unsustainable in law. This irregular procedure resulting in much prejudice to the petitioner was pointed out to the enquiry officer orally by the petitioner at the time of

enquiry and in fact it was pointed out clearly in the written reply given by the petitioner on 5th January, 1974 to the second show cause notice issued by the punishing authority on 14th December, 1973. But this has not been considered at all by the punishing authority at any time."

A perusal of the papers produced before the Court clearly shows that the respondent has persisted in this complaint all through. One other ground taken by the respondent in the petition was that the enquiry was contrary to clause 26 of the Standing Order (Regulations) concerning Discipline and Appeal of Indian Airlines.

4. Ramanujam, J., himself has summarised the grounds put forward in support of the writ petition as four in number and mentioned them in his judgment as follows:—

"The grounds on which the petitioner attacks the order of removal are four in number. The first ground is that there have been vital and serious defects in the procedure followed by the Enquiry Officer which have vitiated the impugned order. Secondly it is contended that certain additional documents which are necessary for establishing the petitioner's defence have been denied to him and this amounts to the violation of the principles of natural justice. The third ground is that the disciplinary authority, the second respondent merely accepted the findings of the Enquiry Officer without any discussion of the evidence for and against and proceeded to impose the punishment without considering the various objections raised by the petitioner in his answer to the show cause notice. Fourthly it is contended that the appellate authority has merely affirmed the order of dismissal passed by the second respondent without considering the various objections raised by the petitioner in his grounds of appeal."

However, the learned Judge himself did not consider Grounds 2 to 4 elaborately and on consideration of Ground No. 1, he came to the conclusion that there had been violation of principles of natural justice. He also held that Regulation 27 has been violated. On these grounds, he allowed the writ petition. It is the order of the learned Judge allowing the writ petition that is challenged in the present writ appeal before us.

5. Now let us mention certain admitted facts in the present case:

(1) Before a regular enquiry was conducted, statements were taken from certain persons behind the back of the respondent herein and those persons were called in as witnesses on behalf of the management in the regular enquiry subsequently conducted by Thiru R.R. Singh;

(2) At the regular enquiry, the statements which the said nine witnesses had earlier made were not put to them and they were not asked to state whether the contents of the statements were made by them and they stood by the same or not;

(3) The respondent herein was straightaway asked to cross-examine the said witnesses, the respondent having been already furnished along with the memorandum of charges copies of statements made by those witnesses at the preliminary stage; and

(4) The witnesses had in their hands the copies of statements earlier made by them and they gave answers to the questions put to them during the course of cross-examination with reference to the said statements they had already made, the copies of which they had with them.

6. It is on these admitted facts the question that arises for consideration is whether there had been a fair enquiry and a reasonable opportunity had been given to the respondent to prove his innocence with reference to the charges framed against him. It is not in disput that a statement given by a witness at the preliminary enquiry can be made useof in a regular domestic enquiry. But before that can be made use of in a regular domestic enquiry certain conditions must be fulfilled. It is not necessary that the witness must read out the statement itself or parrot-like repeat what he had stated in the statement. But, he must at least affirm the contents of the statement by stating that he made the statement and he stood by the contents of the statement. As pointed out by the Supreme Court in *State of Mysore and others* v. *Shivabasappa Shivappa Makapur.*[1]

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1. (1963) 2 S C J. 104: (1963) 2 S.C.R. 943: A.I.R. 1993 S.C. 375 at 378.

"When the evidence is oral, normally the examination of the witness will in its entirety, take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word by word, and sentence by sentence, is to insist on bare technicalities, and rules of natural justice are matters not of form but of substance. In our opinion they are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged, and he is given an opportunity to cross-examine them."

7. If the statement is not put to the witness and he had not been given an opportunity to affirm the same as indicated above, there is in fact no evidence of that witness in the course of the chief-examination at all and it is very doubtful whether such a statement, notwithstanding copies thereof had already been furnished to the worker, can be used as substantive evidence against the worker concerned. It is this aspect of the matter which weighed with Ramanujam, J., who held that the failure to put these statements to the witnesses and the witnesses not having affirmed their statements—not having stated that they stood by their statements—violated the principles of natural justice. No decision of any Court was brought to our notice by the learned counsel for the appellants holding thar this requirement need not be satisfied even in a domestic enquiry. On the face of it, the procedure followed by the Enquiry Officer is certainly defective, detrimental and prejudicial to the case of the respondent herein.

8. However that is not all. Not only the witnesses were not asked to affirm the statements which they had previously made and to state whether they stood by the statements or not, they were also allowed to use the statements they had earlier given for answering the questions put to them during the course of cross-examination by the respondent. To say the lease, that is to make a mockery of the cross-examination itself. In fact whenever a witness is examined or cross-examined, one of the objects of the cross-examining party is to prove that the veracity of the witness cannot be accepted, he has given conflicting versions and his case has not been consistent and therefore he was not speaking the truth or at least he was not sure of what he saw or what he heard. All these things can be established by several methods. If there is an earlier statement given by a witness and subsequently he was called upon to depose in the course of the enquiry, the inconsistency between the two can be taken advantage of by the other side for the purpose of calling upon the Enquiry Officer not to accept the evidence of the witness. Similarly, the inconsistency between what a witness stated in the chief-examination and what he stated in the cross-examination, can be taken advantage of by the cross-examining party to request the Enquiry Officer not to accept and rely upon the evidence of that witness in view of the inconsistency. If a method is adopted which will avoid all possibilities of a witness being ever inconsistent at all, as has happened in the present case, the other side is denied a very valuable opportunity to establish his innocence and to show that what was spoken against him was not true. It is well-recognised that the principal aims of cross-examination are to destroy material particulars of the evidence-in-chief to weaken the evidence where it cannot be destroyed; to elicit new evidence helpful to the party cross-examining and to undermine the witness or shake his credit by showing that he cannot be trusted to speak the truth or that he is deposing, however honestly, to matters of which he has no real knowledge. It has always been recognised that cross-examination is the most effective and efficacious test which law has devised for the discovery of truth. Consequently any impairment of this right, whether deliberately or accidentally, will have the effect of preventing a person who cross-examines from establishing the truth.

9. Equally it is well-settled that if a witness had made a contemporaneous record of what he has seen or heard the same can be used for refreshing his memory in the course of his giving evidence. But certainly a statement made by him at the stage of a preliminary enquiry cannot be said to be a record made by him of what he saw or heard contemporaneously and therefore what has happened in the present case is contrary to the well-established principles that have to regulate proceedings before any judicial or quasi-judicial authority

and even in a domestic enquiry. In fact as we pointed out already, in this particular case admittedly the statements given by witnesses behind the back of the respondent, were in the hands of the witnesses when they gave answers to the questions put during the course of cross-examination. The very object of the cross-examination is to find out whether the witness is sticking on to what he has stated in the course of his chief examination or whether he has made any statement contrary to the facts or whether there is any contradiction between what he has stated in chief-examination and what he states in cross-examination. Any such opportunity which the respondent was entitled to have, was totally denied to him by the procedure adopted by the Enquiry Officer in the present case. As we pointed out already, the respondent had been making a grievance of this procedure throughout, in his explanation to the second show cause notice and in his grounds of appeal to the appellate authority. But neither of the authorities had any answer to this complaint except to totally ignore the same. From what we have pointed out already it is clear that what happended actually in this case is only a mockery of enquiry and not an enquiry in the real sense of a person accused of certain acts or charged with certain misdemeanour or misconduct getting a real opportunity to defend himself or to establish the truth.

10. In *Khardah and Co., Ltd.* v. *The Workmen*[1] the Supreme Court observed:

"Normally, evidence on which the charges are sought to be proved must be led at such an enquiry in the presence of the workmen himself. It is true that in the case of departmental enquiries held against public servants, this Court has observed in the *State of Mysore* v. *Sivabasappa Shivappa*[2] that if the deposition of a witness has been recorded by the enquiry officer in the absence of the public servant and a copy thereof is given to him and opportunity is given to him to cross-examine the witness after he affirms in a general way the truth of his statement already recorded, that would conform to the requirements of natural justice; but as has been emphasised by this Court in *M/s. Kesoram Cotton Mills Ltd.* v. *Gangadhar*,[1] these observations must be applied with caution to enquiries held by domestic Tribunals against the industrial employees. In such enquiries, it is desirable that all witnesses on whose testimony the management relies in support of its charge against the workman should be examined in his presence. Recording evidence in the presence of the workman concerned serves a very important purpose. The witness knows that he is giving evidence against a particular individual who is present before him. and therefore, he is cautious in making his statement. Besides, when evidence is recorded in the presence of the accused person, there is no room for persuading the witness to make convenient statements and it is always easier for an accused person to cross-examine the witness if his evidence is recorded in his presence. Therefore, we would discourage the idea of recording statements of witnesses *ex parte* and then producing the witnesses before the employee concerned for cross-examination after serving him with such previously recorded statements, even though the witnesses concerned make a general statement on the later occasion that their statements already recorded correctly represent what they stated."

The above decision and a number of others have been considered by the Supreme Court in *Central Bank of India Ltd.*, v. *P.C. Jain.*[2] For the above reasons, we agree with the conclusions of Ramanujam, J., that in this case there had been a denial of an effective opportnnity to the respondent to defend himself and a violation of the principles of natural justice.

11. There is yet another ground on which also the writ petition filed by the respondent has to be allowed. Chapter XIII of the Indian Airlines Corporation Employees' Service Rules and Establishment Orders, deals with discipline and appeals. Rule 78 states—

"The Corporation may from time to time issue Standing Orders governing the conduct of their employees. A breach of these orders will amount to misconduct".

1. (1964) 3 S.C.R. 506: (1965) 1 S.C.J. 97: A.I.R. 1964 S.C. 719 at 722.

2. (1962) 2 S.C.R. 943: (1963) 2 S.C.J. 104: A.I.R. 1963 S.C 375.

1. (1964) 2 S.C.R. 809: (1965) 1 S.C.J. 71: A.I.R. 1964 S.C. 708.

2. (1969) 1 S.C.R. 735: (1969) 2 S.C.J. 583: (1969) M.L.J. (Crl.) 748: A.I.R. 1969 S.C. 983.

Annexure IV contains Standing Orders (Regulations) concerning discipline and appeals. Regulations 26 and 27 are important in the context of the complaint made by the respondent herein. The said Regulation reads as follows:

> "26. When there is a *rimap facie* case against an employee or the explanation referred to in Rule 25 is unsatisfactory, the competent authority shall take cognizance of the case and pass order for initiation of disciplinary proceedings, which will be conducted as follows:
>
> (*a*) The grounds on which it is proposed to take action against the employee should be reduced into definite charges with a statement of allegations enumerating all the facts and circumstances on which the decision to start proceedings against him was taken. (*b*) the charges should be communicated to the official concerned in the form at Appendix I, along with the order of suspension if any, and he should be asked to put in, by a prescribed date, a written statement of his defence, and to state whether he desires to be heard in person, cross-examine witnesses appearing against him and to adduce oral evidence in his defence. One week at least should be allowed for submitting written statement of defence, including details about cross-examining and production of witnesses and being heard in person.
>
> 27. After the written statement of the employee has been received, the enquiring officer shall give him a personal hearing, if the employee has requested the same. In case the employee has desired in his written statement, or the enquiring officer considers it necessary witnesses will be called and examined on such of the allegations as are not admitted in the explanation. The person charged shall be allowed to produce documentary evidence in his defence, to cross-examine the witnesses appearing against him and to examine any witnesses in his defence. All the proceedings will be recorded by the enquiring officer. But the enquiring officer may in his discretion refuse to call any witness for sufficient reasons which should be recorded in writing".

From the second sentence of Regulation 27, it is clear that a witness can be called on behalf of the management to prove the charge made against the employee in either of the two contingencies, namely, in case the employee had desired in his written statement the calling for such witness or even when the employee has not expressed a desire, if the Enquiry Officer considered it necessary. Whichever may be the contingency, what is important is that once such a witness is called, he is to be examined on such of the allegations as are not admitted in the explanation. In this case admittedly the respondent did not admit the charges made against him in his explanation. Consequently, the moment the Enquiry Officer called the nine witnesses, he had to examine them on the points not admitted by the respondent in his explanation. Admittedly again, the same has not been done. In fact at one stage the learned counsel for the appellants who argued the appeal wanted to contend that the second sentence occurring in Regulation 27 does not convey that meaning. But the third sentence belied his contention, because the third sentence dealt with all the three rights to which the delinquent officer was entitled, namely the right to produce documentary evidence in his defence, to cross-examine the witnesses appearing against him and to examine any witnesses in his defence. Consequently, the examination of witnesses contemplated in the second sentence must be examination of witnesses produced by the management for the purpose of proving the allegations not admitted in the explanation of the delinquent employee. Once the purport of this provision was recognised Mr. Pai who argued the appeal had really no answer to the complaint of the respondent that Regulation 27 had not been followed. It is not in dispute before us that an enquiry conducted in violation of the regulations dealing with the enquiry, will be vitiated and this Court will have jurisdiction to quash the resultant order. Hence on this ground also the respondent was entitled to succeed.

12. In view of these points which are basic in the enquiry itself, it is not necessary for us to consider the other complaints made by the respondent herein, even though every one of the complaints cannot be rejected as being without substance, we may point out that though the Enquiry Officer held that all the charges framed against the respondent were proved, the respondent in his explanation dated 5th January, 1974, took up the stand that the allegation against him that he was under the influence of liquor was not proved. However,

the second appellant in his order removing the repondent from service stated:

"I have carefully examined your reply dated 5th January, 1974, to the show cause notice and do not find any substance in the contentions raised therein. In regard to the findings of the Enquiry Officer on charge under clause 16 (11) (which reads 'drunkenness, riotous, disorderly or indecent behaviour in the premises of the establishment), it is observed from the report of the Enquiry Officer that he has held you guilty of disorderly and indecent behaviour in the premises of the establishment. Therefore, your contention that drunkenness has not been established is totally unfounded".

As we pointed out already, we are not dealing with the merits of the charges and we are merely pointing out by way of illustration that all the complaints of the respondent on merits also cannot be said to be totally unfounded. Under these circumstances, the appeal fails and the same is dismissed with costs. Counsel's fee Rs. 1,000.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Natnar Sundaram, JJ.*

M/s. Moneys Transports, Tiruchirapalli Partnership Firm represented by its Partner Mrs. Prabavathi Kunchithapadam. .. *Appellant**

v.

The Tanjore Co-operative Marketing Federation Limited, Vijayapuram-Tiruvarur, T, No. 898 represented by its Secretary. .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 7, *rule* 10 —*Suit for recovery of money—Suit filed on* 3*rd October*, 1970 *in Sub-Court, Tiruchirapalli which had no jurisdiction—Plaint ordered to be returned to plaintiff on* 23*rd September*, 1971 — *Proper Court, Sub-Court, Nagapattinam—Plaint returned on* 13*th October*, 1971 *with endorsement of the Subordinate Judge—Plaint filed on* 14*th October*, 1971 *before the Sub-Court at Nagapattinam— Limitation tried as a preliminary issue — Sub-Judge, Nagapattinam holding that plaintiff should have received the plaint even on* 23*rd September*, 1971 *and accordingly dismissing the suit as barred by limitation — Appeal by plaintiff—Rule* 10 *of Order* 7 *mandatory—Plaintiff could have received the plaint only on* 13*th October*, 1971 *with the endorsement of the Sub-Judge at Tiruchirapalli—Suit held as filed within time.*

The plaintiff filed a suit for recovery of money before the Subordinate Judge, Tiruchirapalli on 3rd October, 1970. Since that Court had no jurisdiction, on 23rd September, 1971, the learned Subordinate Judge ordered the return of the plaint, holding that the proper Court would be the Sub-Court at Nagapattinam. He also made an endorsement on 13th October, 1971, noting that the plaint was returned only on 13th October, 1971. On the next day, 14th October, 1971, the plaint was presented before the Sub-Court, Nagapattinam. There the respondent raised the plea of limitation as one of the issues and it was tried as a preliminary issue. The learned Subordinate Judge, Nagapattinam held that the plaintiff should have received the plaint even on 23rd September, 1971 and that since the plaintiff received the plaint only on 13th October, 1971, the suit was barred by limitation when it was filed before it. Admittedly, the suit filed on

*Appeal No. 582 of 1974. *15th June, 1978.*

3rd October, 1970 was within time. On the preliminary issue, the learned Subordinate Judge, Nagapattinam held the suit was barred by limitation. On appeal by the plaintiff,

Held: There is a difference between the Court by a judicial pronouncement ordering the return of the plaint for presentation to the proper Court and the office of the Court administratively actually returning the plaint to the party. Ordering the return of the plaint does not mean that the plaint was returned that day itself. [*Paras*. 2 *and* 3.]

Rule 10 (2) of Order 7, Civil Procedure Code was a mandatory requirement for the purpose of showing when the plaint was presented in the original Court, when it was ordered to be returned, when it was actually returned and what was the ground on which it was directed to be returned. These requirements in the form of an endorsement on the plaint signed by the Judge himself were absolutely necessary for the purpose of avoiding any controversy before the Court to which the plaint was presented subsequently on these particulars. The plaint was available for being taken return of only on 13th October, 1971 when the learned Judge made the endorsement as required by Rule 10 (2) of Order 7, Code of Civil Procedure. By no stretch of imagination the appellant could have taken return of the plaint prior to 13th October, 1971. [*Para*. 4.]

Case referred to:—

Sayyed Shah Abdul Latif Mohideen Khadiri Suijatha Shabithullahi Sahib v. *Mohammad Labbai*, (1950) 1 M.L.J. 657: 63 L.W. 369: A.I.R. 1950 Mad. 596.

Appeal against the decree dated 30th April, 1973 of the Subordinate Judge, Nagapattinam in Original Suit No. 65 of 1972.

N. Srivatsamani, for Appellant.

T.R. Mani and *S. Gopalaratnam*, for Respondent.

The Judgment of the Court was delivered by

Ismail, J:—This is an appeal preferred by the plaintiff in O.S. No. 65 of 1972 on the file of the Court of the Subordinate Judge, Nagapattinam, dismissing the suit solely on the ground that the same was barred by limitation. The suit was filed by the appellant against the respondent for recovey of a sum of Rs. 24,140 with interest. The suit was originally instituted before the learned Subordinate Judge, Tiruchirapalli, on 3rd October, 1970. There is no dispute that the suit so instituted was within time. The respondent herein took up the plea that the Sub-Court, Tiruchirapalli, had no jurisdiction to entertain the suit, and that the competent Court to entertain and dispose of the suit was the Sub-Court, Nagapattinam. This question whether the Sub-Court, Tiruchirapalli, had jurisdiction or not, was tried as a preliminary issue, and the learned District Judge-Trainee functioning as the Fourth Additional Subordinate Judge, Tiruchirapalli, by an order dated 23rd September, 1971, held that the Sub-Court, Tiruchirapalli, had no jurisdiction to entertain and dispose of the suit, and the competent Court to entertain and dispose of the suit was the Sub-Court, Nagapattinam, and ordered the return of the plaint for presentation to the proper Court. The learned Judge has actually made the endorsement on the plaint only on 13th October, 1971, noting that the plaint was actually returned on 13th October 1971. On the very next day, *viz*., 14th October 1971, the plaint was presented before the Sub-Court at Nagapattinam. Before the Sub-Court, Nagapattinam, the respondent herein took up the plea that the suit was barred by limitation and that plea was the subject-matter of the 11th issue for trial. In fact, it would appear that the respondent requested the Court to try this issue as a preliminary issue. The learned Subordinate Judge, Nagapattinam, having tried the issue as a preliminary issue, by judgment and decree, dated 30th April, 1973 accepted the plea of the respondent that the suit was barred by limitation and dismissed the suit. It is against this dismissal of the suit, the present appeal has been filed by the plaintiff in the suit.

2. As we have pointed out alredy, the suit has been dismissed only on the ground of limitation, and, therefore, we have to consider this appeal only on the question whether the suit was barred by limitation or not. For the purpose of considering this point, we have to find out what was the case put forward by the respondent before the learned Subordinate Judge, Nagapattinam, as regards his plea that the suit was barred by limitation. As we have pointed out already, there is no dispute that the suit as originally instituted in the Sub-Court, Tiruchirapalli, was not barred by limitation, and, therefore, the plea of limitation put forward by the respondent herein must have reference to something that happened subsequently. In other words, the plea of the

respondent was that the plaint having been ordered to be returned by the learned District Judge-Trainee functioning as the Fourth Additional Subordinate Judge, Tiruchirapalli by order dated 23rd September, 1971, the appellant herein should have taken return of the plaint immediately and presented the same before the Sub-Court, Nagapattinam, and ought not to have waited for 20 days and taken return of the plaint on 13th October, 1971 and presented the same before the Sub-Court, Nagapattinam on 14th October, 1971. It is this interval of 20 days between the order directing the return of the plaint made by the learned District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, and the actual taking return of the plaint on 13th October 1971, that was alleged to have constituted the delay in the presentation of the plaint to the proper Court, and, therefore, affected the period of limitation. Paragraph 11 of the order of the learned District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, states as follows:

> "In the result, this Court has no jurisdiction to entertain this suit. The plaint is ordered to be returned for presentation to the proper Court having jurisdiction."

We emphasise the words "The plaint is ordered to be returned" contained in the order of the learned District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, dated 23rd September, 1971. The plaint itself contains the following endorsement signed by the learned District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, on 13th October, 1971:

"In the Court of the Subordinate Judge, Tiruchirapalli—Original Suit No. 477/1970

Name of the Plaintiff:	M/s. Moneys Transports, Tiruchy by its partner Mrs. Prabavathi Kunjithapatham.
Name of the defendant:	The Tanjore Co-operative Marketing Federation Limited, Vijayapuram, Tiruvarur.
Date of presentation of the plaint:	3—10—70
Date of order of return:	23— 9—71
Date of actual return:	13—10—71
Reasons for return:	Vide judgment attached.

Sd/-P. Bhaskaran,
District Judge-Trainee
(IV Addl. Sub-Judge)
13—10—71."

The endorsement shows that the date of the actual return was originally typed as '4th October, 1971', but the same was scored out and altered to '13th October, 1971', in the hand of the learned District Judge-Trainee (Fourth Additional Subordinate Judge) Tiruchirapalli, who signed the endorsement on 13th October, 1971. On the very next day. the plaint was presented to the Sub-Court, Nagapattinam. There is no controversy about all these facts. By accepting the plea of the respondent that the appellant should have taken return of the plaint immediately and presented the same to the Sub-Court, Nagapattinam on the very next day after the order of the learned District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, *i. e.*, 24th September, 1971, the learned Subordinate Judge, Nagapattinam committed a grievous error in ignoring the statutory requirements of Order 7, rule 10, Code of Civil Procedure, as well as the actual endorsement made by the learned District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, and the purport of the order of the learned District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, dated 23rd September, 1971. By order dated 23rd September, 1971, the learned District Judge-Trainee (Fourth Additional Subordinate Judge) ordered the return of the plaint, and that does not mean the plaint was returned that day itself. The order of the learned Judge will have to be fair-copied and signed and, thereafter the officer will have to obtain the signature of the learned Judge on the endorsement before the plaint can be returned to the party actually. The endorsement which we have extracted would show that the office originally intended to obtain the signature of the learned Judge on 4th October, 1971, and that is why the date of the actual return was typed as 4th October, 1971, but for some reason or other, the endorsement was placed for the signature of the learned Judge only on 13th October, 1971, and the learned Judge while signing the endorsement on 13th October, 1971, very rightly scored out the typed date '4th October, 1971', and put the date as '13th October, 1971'. By no stretch of imagination the appellant can be held responsible for

the District Judge-Trainee (Fourth Additional Subordinate Judge), Tiruchirapalli, signing the endorsement on 13th October, 1971. He had no means and no power to compel or force the learned Judge to sign the endorsement either on 23rd September, 1971 itself or immediately thereafter. Therefore, the appellant herein cannot be blamed for something which the office of the Court and the Presiding Officer of the Court had to do.

3. As we have pointed out already, there is a difference between the Court, by a judicial pronouncement, ordering the return of the plaint for presentation to the proper Court and the office of the Court administratively actually returning the plaint to the party. The learned Subordinate Judge, Nagapattinam, in the present case has betrayed a total and complete ignorance of this difference when he accepted the plea of the respondent that the appellant herein should have taken delivery of the plaint then and there, *i. e.*, on 23rd September, 1971, or immediately thereafter and presented the same to the proper Court immediately. It is not clear what exactly the learned Subordinate Judge, Nagapattinam, meant when he observed that the appellant should have taken return of the plaint on 23rd September, 1971 itself—whether the appellant should have snatched the plaint from the hands of the Judge or from the hands of the Officers who had the custody of the plaint without the proper procedure laid down in this behalf being followed. It is *ad nauseam* the learned Subordinate Judge, Nagapattinam, in his judgment goes on repeating that the plaintiff should have taken return of the plaint immediately on 23rd September, 1971 itself and presented the plaint to the proper Court, *viz.*, Sub-Court, Nagapattinam and had not been diligent.

4. We may also draw attention to the statutory requirements in this behalf. Rule 10 of Order 7, Code of Civil Procedure, deals with the return of plaint. Sub-rule (1) of rule 10 says:—

> "Subject to the provisions of rule 10-A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted."

Sub-rule (2) of rule 10 states:—

> "On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it."

This is a mandatory statutory requirement for the purpose of showing when the plaint was presented in the original Court, when it was ordered to be returned, when it was actually returned, and what was the ground on which it was directed to be returned. These requirements in the form of an endorsement on the plaint signed by the Judge himself are absolutely necessary for the purpose of avoiding any controversy before the Court to which the plaint was presented subsequently on these particulars. Without this endorsement having been made on the plaint, the plaint cannot be returned to a party, and the plaint cannot be presented to the proper Court. The learned Subordinate Judge, Nagapattinam, in the present case, has completely lost sight of this requirement of the law when he went on repeating *ad nauseam* that the appellant should have taken return of the plaint on 23rd September, 1971. The learned Subordinate Judge, Nagapattinam. proceeded as if the plaint was actually available for being taken return of on 23rd September, 1971, and because of the default or laches on the part of the appellant, it was not taken return of on that day, and it was taken return of only on 13th October, 1971. On the other hand, as we have shown above, the plaint was available for being taken return of only on 13th October, 1971 when the learned Judge made the endorsement as required by rule 10 (2) of Order 7, Code of Civil Procedure, and by no stretch of imagination the appellant could have taken return of the plaint prior to 13th October, 1971.

5. In view of this conclusion of ours, we have no alternative but to set aside the judgment of the learned Subordinate Judge Nagapattinam, and direct him to dipsose of the suit on merits. It is unfortunate that the suit instituted on 3rd October, 1970 yet, remains undisposed of and has to be tried hereafter. If the learned Subordinate Judge, Nagapattinam had simply followed the ordinary rule laid down in this behalf by this Court as well as the higher Court and the rules of prudence that in appealable cases he should give a finding on all the points in controversy, so that in the event of the appellate Court not agreeing with trial Judge on his conclusion of the preliminary point, time can be saved by the appellate Court, without remanding the suit for fresh disposal, by considering the findings of the trial Judge on the other issues in the suit. In this

connection, we may draw attention to an observation made by this Court in *Sayyed Shah Abdul Latif Mohideen Khadiri Sujjatha Shabithullahi Sahib* v. *Mohammad Labbai and others*[1] In that case, this Court pointed out:

> "It has often been observed by this Court and by the Judicial Committee that in appealable cases, subordinate Courts should as far as possible, receive the evidence adduced and decide all the issues in order to avoid a piecemeal trial and a protracted litigation in the shape of an appeal and remand in case the decision of the Subordinate Court in preliminary issues is not upheld by the appellate Court."

This salutary requirement has been completely ignored by the learned Subordinate Judge, necessitating a protracted litigation which is pending for a very long time.

6. In addition to all these infirmities, the judgment of the learned Subordinate Judge, Nagapattinam, is very unsatisfactory in form also. As we pointed out already the point raised before him and considered by him was a simple one, *viz*., when the suit was in time when filed before the Sub-Court, Tiruchirapalli, whether it became barred by limitation in view of the contention put forward by the respondent that the plaintiff should have taken return of the plaint on 23rd September, 1971, but has taken return of it only on 13th October, 1971, and presented it to the Sub-Court, Nagapattinam on 14th October, 1971, and the interval between 23rd September, 1971 and 13th October, 1971 affected the suit being in time. While deciding this question and simply accepting the contention of the respondent, the learned Subordinate Judge, Nagapattinam, has written more than two pages of printed judgment, repeating *ad nauseam* the same simple contention as well as his view.

7. In these circumstances, the appeal is allowed, this judgment and decree are set aside and the suit is remanded to the learned Subordinate Judge, Nagapattinam, for disposal on merits. The appellant will be entitled to the costs of this appeal. Court-fee paid on the memorandum of appeal will be refunded to the appellant. In view of the fact that the suit is a very old one, the learned Subordinate Judge, Nagapattinam, is directed to dispose of the suit as expeditiously as possible.

1. (1950) 1 M.L.J. 657: 63 L.W. 369: A.I.R. 1950 Mad. 596.

R.S. —— *Appeal allowed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: — *S. Padmanabhan, J.*

A.M. Gandhisan .. *Appellant**

v.

Ayyasami .. *Respondent*

Specific Relief Act (XLVII of 1963), section 20 (1)—Scope and applicability—Agreement of sale in favour of plaintiff—Advance paid by the plaintiff and time fixed for completing the transaction—Plaintiff ready to pay balance of amount—Defendant refusing to execute conveyance—Plea of unfairness of plaintiff—Plaintiff whether entitled to specific performance of the agreement.

The relief of specific performance is an equitable relief and it is in the discretion of the Court in the light of the facts and circumstances of the case either to refuse or grant the relief for specific performance. At the same time it should not be lost sight of that the discretion to be exercised by the Court should not be arbitrary but based on sound judicial principles. [*Para*. 9.]

Held, on the facts of the instant case, that the plaintiff took as unfair advantage and used his position against the defendant to compel him to sell the property to him under the agreement and so the relief of specific performance cannot be granted to the plaintiff.

Cases referred to:—

Muthukumaraswami Goundar v. *Ranga Rao*, (1965) 78 L.W. 136; *Davis* v. *Maushwe Company*, I.L.R. 38 Cal. 805: 21 M.L.J. 1127; *Rangasami Goundar* v. *Periamuthu Goundar*, (1977) 1 M.L.J. 231.

Appeal against the decree of the Court of the Subordinate Judge, Tirupattur in Original Suit No. 16 of 1973.

G.K. Selvarajan and *R. Murugesan*, for Appellant.

R.S. Venkatachari, for Respondent.

*Appeal No. 736 of 1975. *7th March, 1978.*

The Court delivered the following

JUDGMENT:—The plaintiff in O.S. No. 16 of 1978 on the file of the learned Subordinate Judge, Tirupattur, North Arcot, is the appellant. The defendant in the action (respondent herein) is the owner of the plaint schedule property which is of the extent of 9 acres and 51 cents of dry land with a house therein. On 9th November, 1972, the defendant executed an agreement for sale in favour of the plaintiff undertaking to sell the property to him for a sum of Rs. 14,000. On the date of Exhibit A-1 he received from the plaintiff an advance of Rs. 1,000. The stipulation in the agreement was that the defendant should execute the sale deed within three months from the date of Exhibit A-1 on receipt of Rs. 13,000 and if he committed a breach of the agreement, he should pay the plaintiff Rs. 3,000 as damages. Similarly, if the plaintiff failed to take the sale deed on payment of Rs. 13,000 he had to pay the defendant Rs. 3,000 by way of damages. The defendant did not comply with the terms of the agreement. Therefore the plaintiff issued Exhibit A-2 notice to the defendant on 23rd January, 1973 calling upon him to execute the sale deed in terms of Exhibit A-1. Since the defendant did not send any reply, the plaintiff filed the suit for specific performance of the agreement for sale evidenced by Exhibit A-1. It is averred in the plaint that Exhibit A-1 agreement for sale was executed by the defendant pursuant to a panchayat and in the presence of the panchayatdars. The plaint further mentions the fact that prior to the execution of A-1, the agreement for sale, the defendant had purchased the suit property under Exhibit B-4 dated 1st August, 1972. According to the plaintiff though in the document the sale consideration is mentioned as Rs. 20,000 the defendant really paid only Rs. 10,000. This averment has been evidently made to show that actually the plaintiff agreed to purchase the property from the defendant for Rs. 4,000 more than what the latter paid to purchase the property under Exhibit B-4 the defendant paid Rs. 20,000.

2. The defendant filed a written statement to the effect that at the time when he executed Exhibit A-1 he was not aware of the contents of the document and that he could neither read nor write Tamil. He was informed by the plaintiff and the panchayatdars that he would be paid a sum of Rs. 22,000 which is made up of Rs 20,000 which he paid for taking Exhibit B-4. sale deed and Rs. 2,000 which he spent on the purchase of stamp papers. In fact, according to the defendant, it was on the basis of these representations that were made to him he signed Exhibit A-1. He therefore contended that the plaintiff is not entitled to a decree for specific performance.

3. From the nature of the pleadings the trial Court raised the following three points for consideration.

1. Was the defendant deceived in entering into the suit agreement of sale?

2. Is the plaintiff entitled to specific performance?

3. To what relief, is the plaintiff entitled?"

4. The trial Court found that no deception was practised on the defendant by the plaintiff in the matter of execution of Exhibit A-1, agreement for sale, by the defendant but that Exhibit A-1 agreement for sale was vitiated by unfairness. In this view, the trial Court refused to grant the discretionary relief for specific performance in favour of the plaintiff The trial Court, therefore, negatived the plaintiff's claim to the relief for specific performance but passed a decree in favour of the plaintiff for the return of a sum of Rs. 1,000 paid as advance under Exhibit A-1. The plaintiff, aggrieved by the refusal of the trial Court to grant a decree for specific performance in his favour, has filed the above appeal.

5. In support of his appeal, Mr. G. K. Selvarajan strenuously contends that when once the trial Court has come to the conclusion that the defendant executed Exhibit A-1, agreement for sale with full knowledge of the contents therein and that no deception was practised on the defendant by the plaintiff in the matter of the execution of Exhibit A-1, the trial Court should have, as a matter of course, granted a decree for specific performance. On the contrary Mr. R. S. Venkatachari, learned counsel appearing for the defendant/respondent, contends that the trial Court has found that the agreement Exhibit A-1, is vitiated by unfairness and consequently it has refused to the plaintiff the relief for specific performance which is after all an equitable remedy in the discretion of the Court and the trial Court having properly exercised its discretion in one way, it is not for the appellate Court to reverse the decision of the trial Court in the absence of anything to show that the discretion exercised by the trial Court was

either perverse or absolutely unreasonable in the eye of law.

6 Before considering the question as to which of these rival contentions should prevail, it is necessary to state the relevant facts. Admittedly, the suit property belonged to one deceased Chennappa Naidu, the paternal uncle of the plaintiff. The said Chennappa Naidu had no sons but four daughters and therefore, it is the case of the plaintiff that he has been in possession and management of those properties on behalf of the said daughters of Chennappa Naidu. While, so the plaintiff himself had an idea to purchase this property and as a matter of fact, the husbands of the four daughters of the original owner, the deceased Chennappa Naidu entered into an agreement for sale of the suit property with the plaintiff under Exhibit B-3 dated 2nd June, 1972. The consideration mentioned in Exhibit B-3 is Rs. 10,000. However, the daughters of Chennappa Naidu who are the owners of the property came to know of Exhibit B-3, agreement for sale, by their husbands and they remonstrated with the result that Exhibit B-3, fell through. Just two months later the four daughters of Chennappa Naidu executed Exhibit B-4 in favour of the defendant for Rs. 20,000.

7. It is admitted by the plaintiff that the defendant is an illiterate person. At the same time Mr. Selvarajan, learned counsel, would submit to the Court that on that score alone it cannot be taken that the defendant is not a man of the world and therefore, he cannot be easily deceived into signing any paper without his being made aware of the contents of the same. Therefore, the learned counsel pleads that the finding of the trial Court that the defendant was aware of the contents of Exhibit A-1 at the time he signed the same cannot be challenged.

8. Mr. R. S. Venkatachari, appearing for the defendant (respondent) also was not able to point out any piece of material evidence in the case to show that the defendant was not aware of the contents of Exhibit A-1 at the time he signed the same. It can, therefore, be taken as established that there was no deception practised on the defendant at the time when he entered into the agreement for sale Exhibit A-1.

9. All the same, the question that falls for consideration is whether the plaintiff would be entitled to a decree for specific performance on the facts and circumstances of the case. It is well-known that the relief of specific performance is an equitable relief and it is in the discretion of the Court in the light of the facts and circumstances of the case either to refuse or grant the relief for specific performance. At the same time it should not be lost sight of that the discretion to be exercised by the Court should not be arbitrary but based on sound judicial principles. Section 20 (1) of the Specific Relief Act reads as follows:—

"20 (1). The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal."

10. Section 20 (2) of the Specific Relief Act reads thus:—

"20 (2). The following are cases in which the Court may properly exercise discretion not to decree specific performance.

(*a*) Where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant, or

(*b*) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(*c*) Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation. 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (*a*) or hardship within the meaning of clause (*b*).

Explanation. 2.—The question whether the performance of a contract would involve hardship on the defendant within the mean-

ing of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

11. In this case, it is clear that under Exhibit B-4 the defendant paid Rs. 20 000 to his vendor for the purchase of the property. It cannot be also disputed that he must have spent another Rs. 2,000 towards stamp and registration charges for taking the sale deed. However, the plaintiff has stated in his plaint that the consideration for Exhibit B-4 is not Rs. 20,000 but only Rs. 10,000. The trial Court has rejected this plea of the plaintiff and found that a sum of Rs. 20,000 is the consideration for Exhibit B-4 and not Rs. 10,000 as alleged by the plaintiff. A perusal of Exhibit B-4 would show that Rs. 15,000 was paid in cash and for the balance, a promissory note under Exhibit B-5 dated 1st August, 1972 was executed by the defendant in favour of Kullammal one of the vendors. The fact that this promissory note was executed in favour of Kullammal for the balance of consideration due under Exhibit B 4 sale deed is corroborated by Exhibit B-7, dated 18th September, 1972 a release deed executed by Rajammal and others to the defendant wherein a reference is made to Exhibit B-5, promissory note. Apart from this, the defendant has examined himself as D.W. 2. and one of his vendors Kullammal as D.W. 1 and D.W. 3 who is the scribe of Exhibit B-4. All of them have stated that the consideration for Exhibit B-4 was Rs 20,000. It can, therefore, be safely taken that the real consideration that passed under Exhibit B-4 was Rs. 20,000 and not Rs. 10,000. No doubt P.Ws. 1 to 3 have stated that before the panchayatdars the defendant said that he paid only Rs. 10,000 for his purchase under Exhibit B-4 and not Rs. 20,000. This evidence has not been accepted by the trial Court My attention has not been drawn to any clinching circumstance which could persuade me to come to the conclusion that the consideration for Exhibit B-4 was not Rs. 20,000 but only Rs. 10,000. In fact, the learned counsel for the appellant did not canvass the finding of the trial Court on this aspect. Therefore, the attempt made by the plaintiff in the plaint to give some reason for the defendant agreeing to sell the property in his favour for Rs. 14,000 when he had parted with Rs. 20,000 and spent an additional sum of Rs. 2,000 for the purchase of the property just three months prior to the date of Exhibit A-1 has miserably failed.

12. The learned counsel would, however, urge before me that though the property admittedly belonged to his paternal uncle, the same was in his possession and enjoyment for a long time and the daughters of Chennappa Naidu were, therefore, not in a position to put the defendant in possession of the property on the basis of Exhibit B-4. The plaintiff himself was not willing to surrender possession of the property. In the circumstances, the defendant found himself in a position of not being able to get possession of the property which he obtained under Exhibit B-4. It was in these circumstances, a panchayat was held and in order to settle the matter between the plaintiff and the defendant, the panchayatdars suggested the plaintiff purchasing the property on payment of Rs. 14,000 and it was on this basis that Exhibit A-1 the agreement for sale, was entered into by the defendant with the full knowledge of the contents and the terms of Exhibit A-1. From the very case of the plaintiff as now put forward by him which was not put forward in the pleadings, one thing is clear that the plaintiff was in possession of the property belonging to the vendors under Exhibit B-4 for and on their behalf. His attempt to somehow appropriate the property for himself at a low price of Rs. 10,000 failed in view of the fact that the agreement Exhibit B-3 entered into by the husbands of the owners of the property failed. Naturally, therefore, he was not in a position to reconcile himself to the defendant purchasing the property and he therefore decided not to part with the possession of this property. It is not contended before me nor has it been pleaded that the plaintiff has been in possession of the property under some legal right such as, as a cultivating tenant or a mortgagee or any other right known to law. On the other hand, it is his specific case that he has been in possession of the suit property only for and on behalf of the four ladies. It is in this background we have to consider the question whether the plaintiff attempted to overreach

the illiterate defendant in the matter of taking Exhibit A-1 agreement for sale. When the plaintiff refused to part with the possession but retained the same, for which he had no right in law, and compelled the defendant practically to enter into the agreement for sale, he was not acting on terms of equal footing with the defendant; but for the fact that the plaintiff was in possession of the property and was not willing to surrender possession to the defendant peacefully, the latter would not have entered into an agreement for sale for the low sum of Rs. 14,000, particularly when he had parted with Rs. 20,000 and spent a further sum of Rs. 2,000, in all Rs. 22,000 for taking Exhibit B-4 sale deed. I have therefore no hesitation in agreeing with the Court below that Exhibit A-1 agreement for sale is unfair.

13. The plaintiff obtained Exhibit A-1 agreement for sale from the defendant by using his possession, which had not legal origin, against the defendant and refusing to surrender possession to the defendant which the latter was entitled to get in terms of Exhibit B-4. There is no doubt that the terms of Exhibit A-1 are such which give the plaintiff an unfair advantage over the defendant and that it was entered into under the circumstances which would make it inequitable to enforce specific performance.

14. The learned counsel for the appellant urges that the mere fact that the defendant with open eyes agreed to sell the property for Rs. 14,000 even though he had paid Rs. 20,000 under Exhibit B-4 would not be sufficient to refuse specific performance. He relies on *Explanation* 1 of section 20 of the Specific Relief Act to show that mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (*a*) or hardship within the meaning of clause (*b*). The learned counsel relies on a Bench decision of this Court reported in *Muthukumaraswami Gounder* v. *Ranga Rao*[1]. In the said decision, Jagadisan, J., speaking for the Bench has laid down the law thus:

"Mere mental distress, however acute it may be would not be sufficient in law to enable the distressed individual to get out of clumsy bargains which he might have made. An onerous bargain is not one which can be resisted to be performed unless it is established that it is also unconscionable or that the plaintiff has taken an improper advantage of his position See *Davis* v. *Maushwe Co.*[1]. Improvidence on the part of the defendant as such would not be a proper ground for refusing specific performance. Where no other element is present except that the bargain is bad, 'it is not the rule in equity to deny specific performance. However wide the jurisdiction of the Court may be to grant succour to persons who have been victimised there is no power to grant relief to a person whose only complaint is that the bargain is foolish and improvident. If the Court were to strike down a bargain on the ground that it was not wise on the part of one of the contracting parties to have entered into it, it would be assuming on overriding power to interfere with the freedom of contract".

15. In that particular case it should be noticed that there was no other element present except the bargain was bad. The learned Judge has found that the evidence on record was not sufficient to establish that the price of Rs 9 500 offered by the plaintiff and accepted by the first defendant was so grossly inadequate as to suggest that the plaintiff took advantage of the ignorance or illiteracy of the first defendant. The learned Judges relied on the following passage from Fry in his book on Specific Performance:

"To make a contract for an insufficient consideration incapable of enforcement by the purchaser, would be practically to prevent a man from selling his property at less than its value however impossible it might be to sell it at its value, however desirous he might be to sell it for the price actually obtained, however desirable it might be for his interest that he should do so, and however unwilling or unable the purchaser might be to purchase at its full value. The freedom of contract including in it the freedom to enter into enforceable contracts, should never be infringed without sufficient cause. But furthermore, if inadequacy of consideration short of fraud were a bar to specific performance, the question would arise as to the amount of inadequacy which should so operate, a question not easy to answer".

Though on the facts of that case, the propositions of law laid down by the learned

1. (1965) 78 L.W. 136.

1. (1911) 38 I.A. 155: I.L.R. 38 Cal. 805: 21 M.L.J. 1127.

Judges are unexceptionable, I am afraid that the said decision may not help the present appellant We find the following rule stated in Fry on Specific Performance at pages 190 and 191:

"Whenever there are evidence of distress in the party against whom performance is sought, or he is an illiterate person, or whenever there are any circumstances of surprise, or want of advice, or anything which seems to import that there was not a full entire and intelligent consent to the contract, the Court is extremely cautious in carrying it into effect. Still, it is not the doctrine of the Court that a man cannot contract without his Solicitor at his elbow, or that a man in insolvent circumstances, or in prison, is disabled from selling his estate; and if a contract made under such circumstances will bear the careful examination of the Court and the full light of day, it will be specifically enforced'.

In Halsbury's Laws of England, Volume 36, at page 299, we find the following proposition:

"Again, there may be circumstances in the position or mental state of the party against whom specific performance is sought, such as to render it inequitable that he should be forced by the Court to perform his contract, such as, for instance, intoxication intimidation and duress, mental weakness not amounting to incapacity to contract, distress, illiteracy, want of advice, or similar circumstances appearing inconsistent with intelligent consent. In all such cases it need not be shown that the plaintiff was guilty of intentional unfairness".

Again at page 301, in paragraph 428 it is stated as follows.

"Another form of oppressiveness which may prevent specific performance may simply consist in the fact that performance would involve great hardship, even though without any impropriety on the part of the plaintiff. Such hardship may be either obvious on the face of the contract, or more or less latent and due to collateral matters; the latter case leads more readily to the Court's giving effect to the hardship and refusing performance".

The expression 'unfair advantage' in section 20 (2) of the Specific Relief Act arose for interpretation before a Bench of this Court in *Rangasami Gounder* v. *Periamuthu Gounder*[1], Ramaprasada Rao, J., laid down the dictum as follows:

"The expression 'unfair advantage' appearing in section 20 (2) of the Specific Relief Act is not one of art but is one which is pregnant with meaning. The unfair advantage should be such that on an overall appreciation of the situation the Courts which are to adjudicate upon the subject-matter should come to a conclusion that the party which is complaining of such an unfair advantage should have been tricked and that there was a designed approach on the part of the plaintiff to victimise the alleged affected party. In the light of *Explanation* 1 to the section, mere inadequacy of consideration is no ground to refuse the discretionary relief of specific performance. There is a mountain of difference between inadequacy of price and gross inadequacy of price. Even in cases where the price is grossly inadequate, Courts require an additional dose of proof that by reason of such a design on the part of an avaricious purchaser, the vendor has been victimised".

Considering the facts of this case in the light of the principles laid down by the proposition found in Fry on Specific Performance and Halsbury's laws of England and on the principles laid down in the decisions above referred to, I have no hesitation to conclude that it would be inequitable and hard and even unconsionable to grant a decree for specific performance against the defendant in this case. As has already been found by me, the defendant purchased the property for Rs 20,000 just three months prior to the date of Exhibit A-1. The plea of the plaintiff that the real consideration for Exhibit B-4 was only Rs 10 000 has been found to be false. The plaintiff has no plea that the market value of the property as on the date of Exhibit B 4 as well as on the date of Exhibit B-1 was only Rs. 10,000. There is evidence to show that under Exhibit B-3 the plaintiff attempted to purchase this property for a sum of Rs. 10,000 in June, 1972 and that, that attempt miserably failed. It is the plaintiff's own case that because he was in possession of the property and that because he refused to surrender possession to the defendant pursuant to Exhibit B-4 the sale deed taken

1. (1977) 1 M.L.J. 231.

by him from Kullammal and others that the defendant agreed to sell the property to him for Rs. 14,000. It is clear from these circumstances that the plaintiff took an unfair advantage and used his possession against the defendant to compel him to sell the property to him under Exhibit A-1 for a sum of Rs. 14 000 an amount far less than the amount for which he purchased the very property under Exhibit B-4. I therefore hold that the trial Court had not arbitrarily refused to exercise the discretion. I am not persuaded to disagree with the said exercise of the discretion by the trial Court and grant the relief of the specific performance to the plaintiff at the stage of this appeal.

16. The plaintiff is also disentitled to the equitable remedy on another ground. To justify his having taken Exhibit A-1 for a consideration of Rs 14,000 he came forward with a plea that the real consideration for Exhibit B-4 was only Rs. 10 000 and not Rs. 20 000 That has been found to be false by the trial Court. That no attempt has been made before me to justify the said finding of the trial Court would show the paucity of evidence on the side of the plaintiff to substantiate the plea. On the other hand, before me the appellant's counsel had to rely upon the fact that it was because he was in possession of the property, the defendant was not able to get possession from him that he agreed to sell the property for the low figure of Rs. 14,000 Ismail, J., in *Ramaswamy Gounder v Venkatachalam*[1], has stated that the falsity of the case put forward by the plaintiff would disentitle him from obtaining the discretionary relief of specific performance of agreement. On this ground also *viz*. that the plaintiff did not come to Court with clean hands but that he set up a false case that the consideration for B-4 was not Rs. 20,000 but only Rs 10,000 certainly, to gives the impression to the Court that Exhibit A-1 agreement for sale had been entered into for a reasonable and proper price. Hence the plaintiff has to be refused the relief he has asked for. The trial Court has passed a decree in favour of the plaintiff for the return of Rs. 1,000 paid as advance. That decision is proper. I therefore confirm the judgment and decree of the trial Court and I dismiss the appeal with costs.

S.J. —— *Appeal dismissed.*

1. (1976) 1 M L.J. 243.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

V. Ramalingam .. *Appellant**

v.

S.C.S. Palaniappan .. *Respondent.*

Lease—Vacant land Suit for eviction — Notice terminating monthly lease—Tenant claiming lease as one for manufacturing purpose—Tenant having motor workshop on the land leased Manufacture of silent mufflers by tenant as incidental to repairs to motor engines—Tenant claiming value of improvements and for benefits of City Tenants Protection Act—Tenant's constructions on the plot objected to by plaintiff and tenant not entitled to cost of fixtures and superstructure—Eviction ordered.

The plaintiff had leased a vacant site to the defendant in 1959 under an oral agreement for the purpose of the lessee's motor workshop. This lease expired on 31st December, 1963, and thereafter the tenant was holding over. Inspite of protests from plaintiff, the tenant had put up superstructures. On 4th May, 1970, the plaintiff sent a notice to the tenant terminating the monthly lease and for possession. However, the tenant claimed that the lease was for manufacturing purpose, that he was manufacturing silence mufflers on the land leased, that he was entitled to the value of improvements and also that the lease could not be terminated so long as the tenant was paying rent. The trial Court decreed the suit and on appeal by the tenant the lower appellate Court confirmed the decree except that there was a direction that the tenant would be entitled to the cost of improvements. The concurrent findings of the Courts below were that the appellant (tenant) was manufacturing silence mufflers but was not selling on commercial scale and that the manufacture was incidental to the repair of motor engines. The tenant filed an appeal and the plaintiff filed cross-objections.

Held: If the predominant purpose of the lease was not manufacturing purpose and the manufacturing of silence mufflers was only incidental to carry out the repairs, then there was undoubtedly a proper notice of termination of lease. [*Para*. 6.]

It was in evidence that at the time when the wall was raised, notice was issued by the

*S.A. No. 560 of 1975 and Cross Objections.

25th July, 1978.

plaintiff objecting to the raising of the wall and then again when the defendant applied for licence, that was objected to by the plaintiff, so it could not be said that the plaintiff had acquiesed in this case and as a matter of fact there was positive dissuation from putting up any superstructure. [*Para*. 7.]

Cases referred to:—

Allenbury Engineers v. *R K Dalmia*, (1974) 2 S.C.J. 38: (1973) 2 S.C R 257: (1973) 1 S.C.C. 7: A.I R 1973 S.C 425; *Alagarswami* v *T J. Andhoni*, (1961) 1 M.L J. 158: 74 L.W 222: A.I R 1961 Mad. 293: *Periaswami Pillai* v. *Arunajadeswaraswami Temple*, (1967) 1 M.L.J. 93: 79 L W. 637: A I.R. 1967 Mad. 257; *Sundareswarar Devasthanam* v. *Marimuthu*, I.L.R (1963) Mad 1054: 76 L.W. 381 A.I.R. 1963 Mad. 369; *Ariff* v. *Jaudunath Majumdar Bahadur*, 60 M.L J. 538: (1931) L.R. 58 I.A. 91: 33 L.W. 586: A.I.R. 1931 P.C. 79.

Appeal against the decree of the Court of the IV Additional Subordinate Judge, Salem in A S No. 23 of 1973, preferred against the decree of the Court of the Additional District Munsif, Salem in O.S. No. 1026 of 1970.

S. Sethuratnam, *T. Somasundaram* and *A.S. Venkatachalamoorthy*, for Appellant.

T.S. Subramaniam and *K. Kannan*, for Respondent.

The Court delivered the following

JUDGMENT.—The facts leading to the second appeal which has been preferred by the defendant are as under:—

2. Vacant site lying within Salem Town limits was leased out in favour of the defendant in 1959 under an oral agreement for the purpose of the lessee's motor workshop. The original period of lease expired on 31st December, 1963, and thereafter, the defendant is holding over. Inspite of the plaintiff's protests, the defendant has put up the superstructures in order that he could permanently squat on the property. On 4th May, 1970, the plaintiff sent a notice to the appellant herein by which he terminated the monthly lease and requested the tenant to surrender possession. In defence it was contended that the lease is not terminable as long as the defendant was paying rent and that was the basic term at the commencement of lease. During the various constructions, the plaintiff stood by. The defendant is entitled to purchase the suit site under the provisions of the City Tenants' Protection Act. The lease was one for manufacturing purpose and therefore, there has not been proper notice under section 106 of the Transfer of Property Act. In any event the tenant is entitled to the value of improvements before possession could be ordered.

3. The learned Additional District Munsif of Salem on an elaborate consideration of the oral and documentary evidence, came to the conclusion that the defendant was not entitled to the benefits of the City Tenants' Protection Act and that there has been a proper notice of termination of tenancy and consequently, decreed the suit. Thereupon A S No 23 of 1973 was preferred to the learned Subordinate Judge Salem who also concurred with the findings of the trial Court and dismissed the appeal, however, subject to the condition that the defendant will hand over possession of the suit property with such improvements for which the defendant would be paid compensation before effecting delivery. It was also said that the defendant would be at liberty to remove such fixtures and superstructures as would be declared as not amounting to improvements. It is against this concurrent judgments, this second appeal has been preferred.

4. In so far as the above direction has been given, memorandum of cross-objections has been preferred by the plaintiff contending that there will be no liability on the part of the plaintiff to pay for the improvements.

5 Mr. T R. Ramachandran, learned counsel for the appellant, draws my attention to the judgment of the Supreme Court reported in *Allenbury Engineers* v. *R.K. Dalmia*[1] and also *Alagarswami* v. *T J. Andhoni*[2] and submits that since the object of the lease is for a manufacturing purpose, there has not been a proper notice under section 106 of the Transfer of Property Act. As against this, the learned counsel for the respondent Mr. T.S Subramaniam would submit that there is absolutely no manufacturing. The manufacturing of silencer mufflers is only incidental to the repair work and the very decision of the Supreme Court relied on by the learned counsel would support his plea that the

1 (1973) 1 S C C 7: 1 73) 2 S.C R. 257: (1974) 2 S.C J. 38: A I.R 1973 S C 425

2. (1961) 1 M.L J. 158: 74 L.W. 222: A.I.R. 1961 Mad. 293.

manufacturing is incidental and the primary and predominant purpose of the lease is not manufacturing. As regards the cross-objection, the learned counsel for the cross-objector Mr. Subramaniam contends that having regard to the dicta laid down in *Periaswami Pillai* v *Arunajadeswaraswami Temple*[1] and *Sundareswarar Devasthanam* v. *Marimuthu*[2], this is not a case in which the plaintiff would be liable to pay compensation. As a matter of fact, at every point of time, before the superstructure was put up it was specifically protested against. In fact, in the evidence of D W 1 there is a clear admission that both at the time of construction and at the time of submitting the plan, there were protests by the plaintiff. As against this, it is pointed out by the learned counsel for the appellant who opposes the memorandum of cross-objections that under Exhibit B-1, it has been clearly agreed that he would be paid compensation for any superstructure that has been put up.

6. Section 106 of the Transfer of Property Act reads thus:

> "In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.
>
> Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

Therefore, if the lease is for manufacturing purposes, there must be a six months' notice. In the instant case, notice was given on 4th May, 1970 giving time to vacate till 30th June, 1970 as evidenced by Exhibit A-3. If the lease is for manufacturing purposes, then the notice Exhibit A-3 is certainly not in accordance with section 106 of the Transfer of Property Act. The concurrent findings of the Courts below in this case are that no doubt, the appellant was manufacturing silencer mufflers but he was not selling them on commercial scale and the manufacturing was only incidental for carrying out the repairs of the motor engine. What the lower appellate Court says on this aspect can be conveniently extracted here for a proper appreciation of the point in dispute. In paragraph 8 of the judgment of the lower appellate Court it is stated thus:

> "Accepting the production of silencer mufflers as true, can it by itself prove that such production or manufacture is an agreed purpose and further a dominant purpose of the lease? The defendant has nowhere stated that he produced this article on a commercial scale and sold them to consumers other than his clients for repairs. This article is a small accessory needed for carrying out repairs of motor engines. It must be deemed that defendant made silencer mufflers as an ancillary job and used them in his work of motor repairs which was the dominant or primary trade carried on by him and agreed to by the lessor. Inasmuch as the lease is oral, the defendant has a heavy onus to show that the lessor agreed categorically to the change of his business or enlargement of his trade. The volume of manufacture of Silencer Mufflers is so small that it cannot be treated as a new or an independent job unconnected with the motor workshop service. Repairs may involve replacement of some minor parts which the repairer may get from other sources. To avoid purchase of minor components, improve efficiency and increase profit, the defendant might have started making of silencer mufflers by himself. It is admitted case that the tenant went into possession for the purpose of carrying on the trade of motor workshop and not anything else. Whatever incidental manufacture was made by the tenant shall be interpreted as subordinate work and not as an independent trade. I hold that manufacture of silencer mufflers is not an additional or independent purpose to which the scope of lease was enlarged with the approval of the lessor".

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1. (1967) 1 M.L.J 93: 79 L.W 637: A.I.R 1967 Mad 257

4. I.L.R. (1963) Mad. 1054: 76 L.W. 381: A.I.R. 1963 Mad. 369.

Under similar circumstances their Lordships of the Supreme Court in *Allenbury Engineers* v. *S.R.K. Dalmia*[1], stated thus:

"Even if the evidence of Jain were accepted *in toto*, and we were to find that some spare parts were being manufactured for repairing or reconditioning the vehicles, the dominant purpose of the lease would still have to be regarded as one for storage and resale of the vehicles and not for manufacturing purposes. Manufacturing of spare parts would then be merely incidental to the main purpose of disposal of these vehicles as without repairing or reconditioning them, such disposal could hardly have been possible. In our opinion, the appellants failed to establish that the dominant purpose of the lease was manufacturing purpose. In that view, the appellants could not have challenged the legality of the notice."

This ruling squarely applies to the facts of this case. If the predominant purpose of the lease is not manufacturing purpose and the manufacturing of silencer mufflers was only incidental to carry out the repairs, then there is undoubtedly a proper notice.

7. Turning to the liability of the plaintiff to pay compensation, in *Sundareswarar Devasthanam* v. *Marimuthu*[2], a Division Bench of this Court held thus:

"We may in passing point out the unsoundness of the latter view. Once the Madras City Tenants Protection Act is held not to apply, we cannot see how the landlord can be compelled to pay compensation. Both under the common law as well as under the Transfer of Property Act, the right of a tenant who had put up a superstructure on a lease-hold land which was taken on a terminable lease, will be only to remove the superstructure at the time of delivery of possession on the termination of the lease. There would be no right to compel the landlord unless the latter agrees to do so to pay compensation for unwanted superstructure. Secondly the landlord who had obtained possession of the land as in the present case cannot be compelled to surrender back the land because the tenant had failed to remove the superstructure at the time he vacated the property.

1. (1974) 2 S.C.J. 38: A.I.R. 1973 S.C. 425 at 429
2. I.L.R. (1963) Mad. 1054: A.I.R. 1963 Mad. 369.

If it is proved that the landlord had appropriated the materials which formed part of the superstructure the tenant can only have the value thereof assessed and recover the same."

Similar is the position here. It was found by the Courts below that the appellant is not entitled to the benefits of the City Tenant's Protection Act in which case the direction given by the lower appellate Court in paragraph 12 of its judgment is incorrect. I may at this stage conveniently refer to the decision reported in *Periaswami Pillai* v. *Arunajadeswaraswami Temple*[1] in which a learned single Judge of this Court at page 96 held thus:

"With regard to the memorandum of cross-objections it is clear that the lower appellate Court has committed a mistake in relying upon the decision in *Alaginswami Kone* v. *Andhoni*[2]. Having regard to the terms of the lease deed in that case, that decision has no application to the instant case. In that case the lease deed contained a provision that on the termination of the lease when the lessor terminated his possession, the lessee would be entitled to the cost of the construction of improvement which was effected on the property with the result it could be said that when the lessee effected improvements, he did them in good faith and on the presumption that he would be entitled to the value thereof. The principle will have no application to a case in which the lease deed contains a contrary provision. Exhibit A-4 contains a clear covenant that on the termination of the lease the lessee should hand over possession of the property along with the building, trees etc. without any claim for compensation. The first defendant cannot blow hot and cold. If he relies upon the lease deed, Exhibit A-4 he is not entitled to get compensation. If the lease deed becomes inadmissible for want of registration, under section 51 it is clear that a lessee would not be entitled to compensation in respect of any improvements effected on the property demised. Mr. Venkatarama Iyer drew my attention to the decision of the Privy Council in *Ariff* v. *Jadunath Majumdar Bahadur*[3] and the observations therein

1. (1966) 1 M.L.J. 93: 79 L.W. 637.
2. (1961) 1 M.L.J. 158: 74 L.W. 222: A.I.R. 1961 Mad. 293.
3. (1931) L.R. 58 I.A. 91: 60 M.L.J. 538: 33 L.W. 586: A.I.R. 1931 P.C. 79.

at page 546 to the effect that if a lessee erects any building not in a mistaken belief of his rights in regard to the land but in assertion of rights which he correctly believes to be his but which ultimately turn to be unfounded in law, he cannot claim compensation. From this it will be clear that the first defendant is not entitled to any claim for compensation. The result is the Memorandum of cross objections is allowed."

This decision is equally applicable to the facts of this case In fact, in the evidence of D.W. 1 in more than one place it is found that at a time when the wall was raised, notice was issued by the plaintiff objecting to the raising of the wall and then again when the defendant applied for licence, that was objected to by the plaintiff. So, it cannot be said that the plaintiff had acquiesced in this case and as a matter of fact there was positive dissuation from putting up any superstructure. Merely because under Exhibit B-1, in order to purchase peace, he stated that he would be prepared to pay compensation that does not mean that the plaintiff is legally liable whatever may be the moral liability.

8. In the result, the second appeal will stand dismissed. The memorandum of cross-objections will stand allowed. The parties will bear their costs in the second appeal as well as in the memorandum of cross-objections. Time to deliver vacant possession till 31st December, 1978. I make it clear that the executing Court shall not grant any further time. This grant of time upto 31st December, 1978 is on the specific condition that the appellant continues to pay every month a sum of Rs. 40 on or before 10th of every succeeding English calendar months without default. Even if a single default is committed, the time granted upto 31st December, 1978 will cease.

9. Since the parties are not agreed about the actual rent I have fixed the liability only at Rs. 40 p.m. having regard to the fact that originally a sum of Rs. 40 per month was fixed. This will not in any way prejudice the rights of the plaintiff respondent to claim such damages for use and occupation or mesne profits regarding which I am told that there are suits pending.

S.J. —— *Appeal dismissed; Cross objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*V. Sethuraman, J.*

M/s. M M. Abbas Brothers and others .. *Appellants**

v.

Seth Chethandas Fathechand and another .. *Respondents.*

Negotiable Instruments Act (XVI of 1881), sections 26, 27—Suit on promissory note—Executant described as a partner in a firm—Whether other partners can be held liable.

The general principle of law is that every one of the partners in a mercantile firm is liable upon a bill drawn by a partner in the recognised trading name of the firm for a transaction incidental to the business of the firm, although the particular partner's name does not appear on the face of the instrument, and although he is "a sleeping and secret partner". Section 27 of the Negotiable Instruments Act, 1881, also provides that every person capable of binding himself may so bind himself or be bound by a duly authorised agent acting in his name. Partners are mutual agents and can bind the firm by their acts. [*Para* 12.]

Even in the absence of an indication under the signature that a person was signing as a partner, it may be possible to infer a liability on the firm provided it is found on the face of the instrument that the borrower is the firm and not an individual partner, who signed the instrument. A person merely describing himself as a partner, cannot however, bind the firm. There must be some indication in the instrument to show that he was signing on behalf of the firm. [*Para.* 14]

Cases referred to:—

Firm of Sadasuk Janki Das v. *Maharaja Sir Kishan Pershad Bahadur and another*, (1919) 36 M.L.J. 429: I.L.R. 46 Cal. 663: 10 L.W. 14 : 46 I.A. 33 A.I.R. 1918 P.C. 146, *Subbanna* v. *Subbamma*, (1965) 2 S.C.R. 661: (1966) 1 M.L.J. (S.C.) 67. (1966) 1 An. W.R (S.C.) 67: (1966) 1 S.C.J. 209: A.I.R. 1965 S.C. 1325; *Kesava Gounder* v. *Rajan*, (1976) 1 M.L.J. 56: 89 L.W. 205: A.I.R. 1976 Mad. 102; *Katta Venkatannagaru Sreenivasayya* v. *Kattagulla Muddu Nagappa* (1936) 71 M.L.J. 738: A.I.R. 1936 Mad. 984; *Penumatsa Rungaraju* v. *Sait*

*Appeal No. 746 of 1974. 21st *June*, 1978.

Devichand Bhootaji Firm, (1945) 2 M.L.J. 113: 58 L.W. 366: A.I.R. 1945 Mad. 439; *Sitaram v. Chimandas*, A.I.R. 1928 Bom. 516: (1928) I.L.R. 52 Bom. 640; *Indur Pattabiramai Reddi v. Kamisetty Bolliah*, (1928) 55 M.L.J. 574: A.I.R. 1928 Mad. 1196.

Appeal against the decree of the City Civil Court (First Assistant Judge) Madras, dated 6th November, 1973 and passed in O. S. No. 2882 of 1971.

S. Gopalaratnam and *P. N. Venugopalan*, for Appellants.

N. Srivatsamani and *R. Krishnaswami*, for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 2 to 4 in O. S. No. 2882 of 1971 in the City Civil Court at Madras are the appellants. The plaintiff filed the suit for recovery of Rs. 17,500 due under three promissory notes, two of which for Rs. 4,000 each, were executed on 11th January, 1969, and the third for Rs. 3,500 on 24th January, 1969. The promissory notes carried interest at 24 per cent per annum. They were executed by one Mallik on behalf of the first defendant. One Moshin Bhai has signed the promissory note as a joint executant and according to the plaintiff he was a partner in the second defendant-firm and had executed the three promissory notes only as such partner so that the second defendant firm, and the partners thereof, defendants 3 and 4, are jointly and severally liable for the debt.

2. The first defendant is a proprietary concern of one Khatija Bee. She filed a written statement stating that the plaintiff had advanced only Rs 7,000 in each, that a sum of Rs. 6,000 had been paid back and that only the balance of Rs. 1,000 was due on the promissory notes. The rate of interest *viz.*, 24 per cent per annum shown in the promissory notes was said to be usurious and illegal.

3. Defendants 2 to 4 filed a common written statement for themselves. They did not admit the signature to be that of Moshin Bhai. He was said to have been ill and for about 2 or 3 years prior to his death, his memory was alleged to have failed. According to them, there was no need for any borrowal and no amount had been brought into the firm's account on the relevant dates. They, therefore, contended that the promissory notes were not supported by consideration.

The following issues were framed:—

(1) Whether the pronotes are not fully supported by consideration ?

(2) What are the amounts actually advanced?

(3) Did the second defendant execute the pronote along with the first defendant ?

(4) Are not the defendants liable to pay the suit claim?

(5) To what relief?

The additional issue which was numbered as Issue No. 6 ran as follows:

(6) Are the suit promissory notes validly executed by the first defendant ?

4. The learned trial Judge held on issue No. 1 that the promissory notes were fully supported by consideration. On issue No. 3 it was held that the second defendant represented by Moshin Bhai, who was the partner, executed the promissory notes along with the first defendant represented by Mallik On Issue No. 4 he held that the amounts due under the promissory notes would have to be paid by defendants 1 to 4 and on issue No. 5 that the plaintiff would be entitled to Rs. 11,500 being the principal advanced with interest at 12 per cent per annum as against defendants 1 to 4. On issue No. 6 the finding was that the validity of the promissory notes and their execution had not been contested in the written statement and that no evidence had been let in to substantiate the case, of absence of liability. The result was that there was a decree in favour of the plaintiff for Rs. 11,500 with interest at 12 per cent per annum with proportionate costs. The first defendant has not filed any appeal and defendants 2 to 4 raised two points *viz.*, whether there is proof that the three promissory notes are supported by consideration and that the signature of Moshin Bhai binds them. I shall first examine the question whether the promissory notes are supported by consideration.

5. On this point, as mentioned earlier, the first defendant had categorically accepted the execution of the promissory notes, while as regards the payment of consideration, it was stated that only Rs. 7,000 had been paid in

cash as against Rs. 11,500 appearing on the face of the three promissory notes. The execution of the promissory notes on behalf of the first defendant is thus a matter of admission. As regards the second defendant it was stated that the signature is not that of Moshin Bhai. If the appellants had any doubt as regards the same, one would have expected them to have replied to Exhibit A-4, which is the copy of the suit notice issued by the plaintiff's counsel to the defendants denying the signature of Moshin Bhai. Exhibits A-6 to A-8 are the acknowledgments signed for or by defendants 2 to 4. Except the mere denial of D.W. 2, there is absolutely nothing to doubt the signature of Moshin Bhai. If really there were any documenis in which Moshin Bhai's siganature was undisputed and if the signatures in those documents were different from those in Exhibits A-1 to A-3, D 2 could have produced them. They have not done so. Thus, there was no scope for the trial Court to compare the admitted signatures with the signatures in Exhibits A-1 to A-3 for the purpose of accepting the theory put forward by the defendants.

6. In the absence of the production of the admitted signatures of Moshin Bhai, the Court below was compelled to infer that the material piece of evidence which should be available with defendants 2 to 4 had not been placed before the Court and that if it was favourable it would have been so produced before Court. Moshin Bhai is unfortunately no more, he having died on 5th of February, 1971 about two years after the execution of the promissory notes. Therefore, the question as to whether Moshin Bhai signed or not has to be considered only in the light of the other evidence on record. The credibility of D.W. 2 has to be considered in the light of his own contradictory evidence in the chief and cross-examinations. While in the chief examination he stated that the notice Exhibit A-4 was received after his father's death on 5th of February, 1971, and that he did not reply because he was not concerned with it, in cross-examination he stated that Mallik was contacted and that Mallik said that he would deal with the matter mentioned in the notice. If really the defendants 2 to 4 were not concerned with the notice, there is no reason why they should have contacted Mallik and accepted his statement that he would deal with the matter. If, however, defendants 2 to 4 were concerned with the notice, there was no proper *explanation* as to why it was not replied to. The plea of non-execution taken by defendants 2 to 4 was rightly rejected by the Court below. There is a presumption under section 118 of the Negotiable Instruments Act that every negotiable instrument was made or drawn for consideration. It is for the defendants to prove absence of consideration. There is no such proof.

7. Now, I consider the next point that the signatures of Moshin Bhai cannot bind these defendants. As mentioned earlier, two promissory notes were executed on 11th January, 1969. Both are identical in form. It is, therefore, enough if reference is made to the language employed in one of them. Exhibit A-2 runs as follows:

> "On demand we jointly and severally promise to pay to Mr. Seth Chetandas Fatehchand, Hindu Undivided Family or order the sum of Rupees four thousand only together with interest at the rate of 24 per cent. per annum for value received in cash Per Pro Zulaikha
>
> ——
>
> goods. Industries,
> Received cash.
> Mallik
> *for* M.M. Abbas & Bros.
> Rs. 4,000 Moshin Bhai,
> Partner."

Exhibit A-3, dated 24th January, 1969 is also in identical terms.

But the signatures are found as follows:

> "*Per Pro* Sulaikha Industries,
> Mallik
> Moshin Bhai, Partner"
> M.M. Abbas & Brothers.

8. The learned counsel for the appellants confined his contention that the signature of Moshin Bhai did not bind them only as regards Exhibit A-3. His contention was that the promissory note did not, on its face, indicate the responsibility of the firm and that the signature of Moshin Bhai should be taken only as binding him and not the firm. Stated differently, the words "Partner, M.M. Abbas & Bros." in Exhibit A-3 represented only a description and did not indicate that as a partner Moshin Bhai signed this instrument. If Moshin Bhai had the intention of binding the firm, then he would have signed, it is argued, for and on behalf of the firm.

9. The contention in this form had not been taken in the written statement in specific language, and did not also appear in the grounds of appeal. Mr. R. Krishnaswami appearing for the respondents objected to the

said contention being taken at this stage. For the appellants the submission was this contention was a purely legal one, which could, under the law, be taken at any stage of the proceedings. Reference in this context was made to the decision of the Supreme Court in *Subbanna* v. *Subbanna*[1] and particularly the passage in paragraph 4 at page 1328 and also to a decision in *Kesava Gounder* v. *Rajan.*[2]

10. The point to be examined is whether the contention described above is one of pure law requesting no fresh investigation of facts so as to be liable to be urged at any stage of the proceedings. According to the learned counsel for the respondents the plea that is now sought to be taken is also an inconsistent plea, which cannot be allowed to be urged without amendment of the written statement.

11. There were two main pleas set out in the written statement. One was that no consideration passed and the other was that the second defendant-firm was not liable. It is on the latter aspect that evidence was let in to show that the second defendant-firm had no need to borrow funds. The point now raised does not appear to be so inconsistent a plea as to merit rejection *in limine* at this stage. It is an alternative case. The point now raised does not appear to be no inconsistent a plea as to merit rejection *in limine* at this stage. It is an alternative case. It is not necessary to investigate any further facts, as the plea is taken only on the basis of the evidence already on record. In a Bench decision of the Bombay High Court in *Sitaram* v. *Chimandas*[3] a similar point was taken only before the appellate Court at the time of the hearing and was examined. I, therefore, overrule the objection taken by Mr. R. Krishnaswami and examine the contention urged for the appellants on its merits.

12. The general principle of law is that every one of the partners in a mercantile firm is liable upon a bill drawn by a partner in the recognised trading name of the firm for a transaction incidental to the business of the firm, although the particular partner's name does not appear on the face of the instrument, and although he is "a sleeping and secret partner". Section 27 of the Negotiable Instruments Act, 1881, also provides that every person capable of binding himself may so bind himself or be bound by a duly authorised agent acting in his name. Partners are mutual agents and can bind the firm by their acts. The Judicial Committee in the *Firm of Sadasuk Janki Das* v. *Maharaja Sir Kishan Pershad Bahadur and another*[1] examined this question of the liability of a third party (so to say). In that case hundies were drawn by one Mohanlal in favour of Seth Sadasuk Chandra Sahu. Below the signature of Mohanlal there were the following "?

> "Acting Superintendent of the Private Treasury of His Excellency Sir Maharaja, the Prime Minister of H.H. the Nizam.?"

"Maharaja" referred to was Maharaja Sir Kishan Pershad Bahadur, who was the Prime Minister of the Nizam in or about the year 1913. Seth Sadasuk Janki Das filed a suit on those hundies impleading not only Mohanlal, but also the Maharaja. The District Judge, who tried the suit, passed a decree only against Mohanlal. But on appeal, this judgment was reversed and the case was remanded with the finding that the hundies had been drawn in a form sufficient to charge the Maharaja if the agency was proved. However, on further appeal, the trial Court's judgment was restored. The plaintiff, therefore, appealed to the Privy Counsel at page 434 of the *Firm of Sadasuk Janki Das* v. *Maharaja Sir Kishan Pershad Bahadur and another.*[1] Lord Buckmaster in delivering the judgment of the Privy Council observed as follows:

> "....It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand ......It is not sufficient that the principal's name should be "in some way" disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills."

1. (1966) 1 M.L.J. (S.C.) 67: (1966) 1 An. W.R. (S.C.) 67: (1966) 1 S.C.J. 209: (1965) 2 S.C.R. 661: A.I.R. 1965 S.C. 1325.
2. (1976) 1 M.L.J. 56: 89 L.W. 205: A.I.R. 1976 Mad. 102.
3. (1928) I.L.R. 52 Bom. 640: A.I.R. 1928 Bom 516

1. (1919) I.L.R. 46 Cal. 663: 36 M.L.J. 429: 10 L.W. 143: 46 I.A. 33: A.I.R. 1918 P.C. 146.

The appeal in that case was dismissed thereby confirming the exoneration of the liability of the Maharaja.

13. In *Katta Venkatannagari Sreenivasayya* v. *Kutagulla Muddo Nagappa*,[1] the body of the promissory note stated that it was a pronote executed by Pedda Mallappa, partner of the firm. This was held inadequate to disclose that it was executed on behalf of the partnership of which Pedda Mallappa was a partner. Similarly in *Penumatsa Rangaraju* v. *Sait Devichand Bhootaji Firm partner Sait Seshmull Kasturji and another.*[2] a promissory note had been executed by one *Satyanarayanaraju* who was the managing partner of a firm. It was recited in the note itself that the money was borrowed for the purpose of the partnership business. Itwas held that neither the recital in the note that the borrowing was for the purpose of the partnership business nor the description of the executant in the preamble as a partner could be regarded as sufficient to disclose that the firm was a party liable on the note. It was pointed out by Patanjali Sastri J., as he then was, that the description of the executant in the preamble as a partner of a named firm was perfectly consistent with his executing the note as the party liable on the note and could not be taken, on a fair interpretation of the instrument, as disclosing the name of the firm, it was not made liable on the instrument. To the same effect is the decision of the Bombay High Court in *Sitaram* v. *Chimandas.*[3] to which reference was made earlier. In that case the signature ran as follows;—

> "G.V. Athale, Managing Proprietor,
>
> Gangadhar & B. Friends, Sandhurst Road, Bombay No. 4."

The suit was filed against not only G.V. Athale, but also as against the firm Gangadhar & B. Friends. After referring to the Privy Council decision in *Sadasuk Janki Das* v. *Kishan Pershad*[4] it was held that the person liable on these hundies was Athale and not any firm under the name of Gangadhar and B Friends.

14. Even where a promissory note which was signed by two persons, who formed a partnership with another person, in their own names without any words following their signatures to describe in what capacity they signed the note, it was held that the firm was liable on the promissory note as the name of the firm as a party liable was sufficiently disclosed in the instrument. *See Indur Pattabirama Reddi* v. *Kamisetty Balliah.*[1] Thus, even in the absence of an indication under the signature that a person was signing as a partner, it may be possible to infer a liability on the firm provided it is found on the face of the instrument that the borrower is the firm and not the individual partner, who signed the instrument. A person merely describing himself as a partner, cannot, however, bind the firm. There must be some indication in the instrument to show that he was signing *on behalf of* the firm. Exhibits A-2 and A-3 bring out the contrast. In Exhibit A-2 the signature is *for* M·M. Abbas and Brothers. In Exhibit A-3 he has signed the instrument only as "partner of M.M·Abbas and Brothers." The latter is a description and does not disclose the firm's liability It is true that different legal result follows from the mere change in the collocation of the words. But it is inevitable, as different results are produced in law by the mere change in the collocation of the words.

15. The result is that the appellants' case as regards Exhibit A-3 that it is not binding on defendants 2 to 4 has to be accepted. The appeal is accordingly partly allowed. The 1st respondent will be entitled to his costs, as substantially the appellants have failed.

R. S. ——— *Appeal allowed in part.*

1. (1936) 71 M.L.J. 738: A.I.R. 1936 Mad. 984.
2. (1945) 2 M.L.J. 113: 58 L.W. 366: A.I.R. 1945 Mad. 439.
3. (1928) I.L R. 52 Bom. 640: A.I.R. 1928 Bom. 516.
4. (1919) I.L.R. 46 Cal. 663: 36 M L.J. 429.

1. (1928) 55 M.L.J. 574: A.I.R. 1928 Mad. 1196.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT:—*P. Govindan Nair, CJ. and V. Ramaswami, J.*

M/s. Bakola Pharmaceutical Company, Kumbakonam. .. *Appellant**

v.

The Union of Government of India, represented by the Secretary, Ministry of Health and Family Planning and U.D., Government of India, New Delhi and another. ... *Respondents.*

(A) *Drugs and Cosmetics Act* (*XXIII of* 1940), *section* 3 (b)— *Drug— Homoeopathic medicines administered through parenteral route, whether fall within the definition of drug.*

(B) *Drugs and Cosmetics Rules—Rule* 2 (dd).

Section 3 (*d*) of the Drugs and Cosmetics Act defines 'drug'. Though it is an inclusive definition even the inclusive part is wide enough to take within its ambit homeopathic medicinal preparations which are administered by parenteral route. In the inclusive definition what is mentioned as inclusive is not exhaustive of what is meant by drug. A drug will have to be given its natural general meaning and in that respect, a particular medicine will fall under the term 'drug'.

The purpose of the Act being the safeguarding of the public health and public interest, by merely saying that a particular medicine is not recognised by any particular pharmacopoeia, a license cannot be refused, nor a licence already granted be cancelled.

To take such a view would mean that anybody can manufacture anything he likes as long as it is not recognised by well-known pharmacopoeias and that it could be labelled under any description he likes and can be sold to the public. If such a view is taken the very object of the Act will be defeated. So the question will also have to be considered whether a particular item of medicine manufactured or attempted to be manufactured is such in regard to which a licence can be refused. It is not as though the Act and the Rules did not make any provision in this regard, for under part VII-A of the Rules, dealing with manufacture for sale of homoeopathic medicine provision is made under Rule 85-C for application to manufacture "New Homeopathic Medicines". New Homeopathic Medicines in this rule will have the same meaning as in Rule 30 AA which states that for the purpose of that rule 'New Homeopathic medicine' means a Homeopathic Medicine which is not specified in the Homopathic Pharmacopoeias of the United States of America or United Kingdom or what is not recognised in authoritative Homeopathic literature as efficacious under the condition recommended. It is thus clear that the rules contemplate 'new homeopathic medicines' being taken into account for being considered as to whether it is good for being administered to human beings orally or otherwise, including parenteral route. But it appears *prima facie* that somehow the procedure has been stultified if not completely eliminated, by the definition that has been incorporated in Rule 2 (*dd*). [*Paras.* 4, 6.]

*W.A. No. 386 of 1974. *6th January,* 1978.

Appeal under Clause 15 of the Letters Patent against the Order of Ismail, J., dated 20th November, 1973 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 3171 of 1973 presented under Article 226 of the Constitution of India to issue a Writ of *Certiorari* calling for the records in R. Dis No. 1393/D-1 (I)/72, dated 10th October, 1972, on the file of the 2nd respondent herein and to quash the same.

The Judgment of the Court was delivered by

Govindan Nair, C. J.—This appeal is taken from the judgment of Ismail, J., dismissing Writ Petition No. 3171 of 1973 which sought the quashing of an order passed by the second respondent herein which is at page 9 of the typed set of papers. Briefly stated this order cancelled a licence held by the appellant in form No. 28 in so far as it related to Homeopathic medicines which are administered by parenteral route. The reasons given in the order as far as we are able to discern are (1) that clause 2 of Part IX of Schedule F of the Drugs and Cosmetics Rules, 1945 has not been complied with by the licenses, (2) that Homeopathic medicines which are administered by parenteral route do not fall within drugs and medicines under the aforesaid rules and (3) that the administration of Homeopathic drugs by parenteral route has not been recognised in any of the Homeopathic Pharmacopoeial.

2. Ismail, J., felt that Homeopathic medicines administered by parenteral route will not fall within the purview of the Act, that rule 2 *(dd)* of the Rules referred to is not *ultra vires* the Act and that further there is no violation of Articles 14 and 19 of the Constitution of India as contended by the writ petitioner and on that basis dismissed the writ petition.

3. Before us it is contended that the order is defective in that the mind had not been applied to the various questions that arises in this case. This submission was made on the basis that the appellant had contended before the authority that passed the order, the second respondent, that the particular medicine manufactured by the appellant was recognised by the well-knwn Homeopathic Pharmacopoeias recognised in the United States of America, the United Kingdom and Germany. Further it was contended that even if it was not recognised by the Homeopathic Pharmacopoeia of United States of America or the United Kingdom or Germany, still the Government will have to consider whether this particular medicine can be recognised subject to such conditions as the Government may prescribe as envisaged by the second clause of item 4-A of the Second Schedule to the Drugs and Cosmetics Act, in Column 2. We shall extract item 4

Class of drug.	*Standard to be complied with.*
4-A Homeopathic medicines.	(1) The standards specified from time to time in the Homoeopathic Pharmacopoeias of the United States of America or the United Kingdom or Germany for the medicines included therein. (2) For the Homeopathic medicines not included in the Homoeopathic Pharmacopoeias of the United States of America or the United Kingdom or Germany, the standards approved by the Central Government and displayed in the prescribed manner on the label of the container.

4. Before we deal with this aspect, it is necessary to understand the purpose and intent of the Act.

'Drug' has been defined under the Act in section 3 (*b*). We shall extract that sub-section:

" 'drug' includes—

(*i*) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals;

(*ii*) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;"

Though it is an inclusive definition even the inclusive part is wide enough to take within its ambit Homeopathic medicinal preparations which are administered by parenteral route. In other words, nothing in the definition would exclude Homeopathic medicines which are to be administered by parenteral route from the definition in the inclusive part of section 3 (*b*). In the inclusive definition what is mentioned as inclusive is not exhaustive of what is meant by a drug. A drug will have to be given its natural general meaning and in that respect, a particular medicine will fall under the term 'drug'.

5. Now if we turn to section 18 (*c*) of the Act, it is clear that no one can manufacture or sell a preparation similar to the one manufactured and sold by the appellant without a licence being applied for and issued in the prescribed manner. The purpose of the Act is to control by insisting on a license. Normally any person is entitled under our Constitution to engage himself in any business or trade and carry on any activity for profit and unless there are restrictions imposed by valid law this right to carry on any business or trade is fairly unlimited. But in the interest of the general public it is not only necessary that such activities are regulated but are even restricted. This is particularly so in the matter of medicines which are meant for human consumption or which are meant to be administered to human beings. It is very necessary from the point of view of hygiene and health and certainly, therefore, vital in public interest. This is the purpose of the act, namely that the

public health must be safeguarded and people must not be allowed to manufacture and sell all sorts of preparations under various captions and perhaps misleading the unwitting public to swallow them or get them administered to them in any other manner which may be injurious to health if not injurious to life itself. This object of the statute must be borne in mind in determining the question that is posed before us. It is not, therefore, sufficient to say that a particular medicine is not recognised by a Homeopathic Pharmacopoeia of the United States of America, United Kingdom or Germany, particularly because of the terms of item 4-A of the Second Schedule which we have read.

6. The Government have a duty if any application is made before it to consider whether Homeopathic medicines not included in the Homeopathic Pharmacopoeia of the United States of America, United Kingdom or Germany can be allowed to be manufactured according to standards approved by the Central Government and displayed in the prescribed manner on the label of the container. What happened in this case was that from the year 1958 the appellant was holding a licence in form 28 and he was manufacturing this particular homeopathic preparation which was to be administered by parenteral route. Later on it was felt that there was no justification for the licence of the appellant being extended for this particular Homeopathic medicine as the view was taken that the medicine was not recognised by the Homeopathic Pharmacopoeia of the United States of America, United Kingdom or Germany. It was also submitted by counsel for the second respondent that the medicine was not within the purview of the Act as at that time and therefore no licence was granted and in that view the licence should be cancelled. We must point out that the purpose of the Act being what we have stated, namely safeguarding the public health and public interest, by merely saying that a particular medicine is not recognised by any particular Pharmacopoeia, a licence cannot be refused, nor a licence already granted be cancelled. To take such a view would mean that anybody can manufacture anything he likes as long as it is not recognised by well-known Pharmacopoeias and that it could be labelled under any description he likes and can be sold to the public. If such a view is to be taken, the very object of the Act will be defeated. So the question will also have to be considered whether a particular item of medicine manufactured or attempted to be manufactured is such in regard to which a licence can be refused. It is not as though the Act and the Rules did not make any provision in this regard, for, under Part VII-A of the Rules dealing with manufacture for sale of Homeopathic medicines, provision is made under Rule 85-C for application to manufacture 'new Homeopathic medicines'. New Homeopathic medicines in this rule will have the same meaning as in Rule 30-AA which states that for the purpose of that rule 'new Homeopathic medicine' means a Homeopathic medicine which is not specified in the Homeopathic Pharmacopoeias of the United States of America or the United Kingdom or which is not recognised in authoritative Homeopathic literature as efficacious under the conditions recommended. It is thus clear that the rules contemplate 'new Homeopathic medicines' being taken into account for being considered as to whether it is good for being administered to human beings, orally or otherwise, including by parenteral route. But it appears to us *prima facie* that somehow the procedure has been stultified, if not completely eliminated, by the definition that has been incorporated in Rule 2 (*dd*) which is in these terms:

> "Homeopathic medicines include any drug which is recorded in Homeopathic provings or therapeutic efficay of which has been established through long clinical experience as recorded in authoritative Homeopathic literature of India and abroad and which is prepared according to the techniques of Homeopathic pharmacy and covers combination of ingredients of such Homeopathic medicines but does not include a medicine which is administered by parenteral route."

We are not considering the validity of this rule in these proceedings because we think that relief can be granted to the appellant without considering the larger question of the rule being *ultra vires* of the Act and the action taken by the order of the second respondent to which we have referred to being violative of Article 14 or Article 19 of the Constitution of India in view of the provisions made in item 4-A of the Second Schedule to the Act which we have adverted to and in view of the specific provision for recognising 'new Homeopathic medicines' even if the particular medicine manufactured by the appellant is not recognised by the Homeopathic Pharma-

copopeia of the United States of America or United Kingdom or Germany. We hasten to point out that the appellant's case is that it is a recognised one and that in any event the question will have to be considered in the light of the provisions of item 4-A of Schedule 2 of the Act. The order of the second respondent is not a speaking order which does not deal with this aspect and it has certainly caused serious injury to the appellant before us; we think, therefore, it necessary to direct a complete reconsideration of the whole question in the light of the provisions of the Act. The case of the appellant that this particular medicine has been recognised by the Homeopathic Pharmacopoeia will have to be examined carefully. The appellant will have ample opportunity to establish his case by adducing evidence and producing such documents as they may be able to produce. Further even if this medicine is not recognised by the Homeopathic Pharmacopoeia of the countries mentioned, the further question whether this medicine could not be recognised a sa 'new Homeopathic medicine' as envisaged in rule 30-AA of the rules will have to be considered and under what conditions if any the second respondent will be able to allow the manufacture and sale of this item will also have to be considered. In the case of the appellant, a blanket cancellation of the licence which has been held by the appellant for a number of years, without adverting to these aspects, cannot be accepted under our law. On this short ground we set aside the order of the second respondent at page 9 of the typed set of papers which we have already adverted to. We direct that the whole matter be reconsidered by the second respondent in the light of what we have discussed above.

7. We repeat that the appellant shall be afforded considerable opportunity to stateand prove its case. In considering these aspects perhaps the second respondent and the Central Government may find it necessary to consider the question whether rule 2 (*dd*) does not stand in the way of such consideration and if so whether rule 2 (*dd*) is supportable under the provisions of the Act or whether it is *ultra vires* of the provisions of the Act. After considering all these aspects, the second respondent will pass fresh orders.

8. We are sure that if there is discrepancy between rule 2 (*dd*) and the Act, and that the rule-making authority has perhaps unwittingly limited the expression 'drug' by applying it only to some drugs, then the Central Govenment will certainly make such amendments to the rules which are necessary for giving the true scope of the Act in the rules.

9. We dispose of the writ appeal in the above terms and direct the parties to bear their respective costs.

R.S. *Appeal allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*Nainar Sundaram, J.*

Hussain Aysa Nachial and others .. *Petitioners**

v.

Vembu Ammal .. *Respondent.*

Pondicherry Cultivating Tenants Protection Act (IX of 1971), rule 19—Order of eviction—Execution—Obstructor in possession—Steps to be taken against obstructor—Provisions of the Code of Civil Procedure to be invoked.

Even though no specific reference to the particular provisions of the Code of Civil Procedure has been made in the Pondicherry Cultivating Tenants Protection Act and in the Rules framed thereunder, yet for the proper conduct of the proceedings before the Revenue Court constituted under the Act and to effectuate and execute orders passed by the Revenue Court under the provisions of the Act and the Rules framed thereunder, there was always the possibility of invoking the aid of the provisions of the Code of Civil Procedure and such an application could not be Ruled out on a proposition that the Act and the Rules did not refer to them.

[*Para.* 8.]

While effectuating and executing orders passed by the Revenue Court if there was an obstruction caused, it would be, apart from specific invocation of the aid of the Code of Civil Procedure, on general principles also, proper to observe the Rules of the Code of Civil Procedure and determine the rights of the obstructor after hearing him and then effectuate and execute the orders. [*Para.* 9.]

Cases referred to:—

Abdul Ravook Sahib v. *M. Kannappan,* I.L.R. (1966) 1 Mad. 538; *Muthiah Nattar* v. *N.S.*

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*C.R.P. No. 3399 of 1974. 19th *June,* 1978.

Ibrahim Rowther, (1968) 1 M.L.J. 190; *Sangram Singh* v. *Election Tribunal*, 1955 S.C.J. 431: (1955) 2 M.L.J. (S.C) 31: (1955) 2 S.C.R. 1: A.I.R. 1955 S.C. 425; *Shanmugathammal* v. *Valliappan*, (1971) 2 M.L.J. 149; *Kumaraswami* v. *Theagarajan*, (1972) 1 M.L.J. 166.

Petition under section 115, Civil Procedure Code, praying the High Court to revise the order of the Revenue Court, Karaikkal, dated 23rd November, 1973 and made in S.A. No. 9 of 1973 in O.P. No. 22 of 1972.

G. Nagarajan, for Petitioner.

V. Radhakrishnan, for Respondent.

The Court made the following

ORDER.—The petitioners in O.P. No. 22 of 1972 on the file of the Revenue Court, Karaikkal, are the revision petitioners. The respondent therein, is the respondent herein. In execution of an order of eviction obtained in O.P. No. 22 of 1972, the, petitioners sought for delivery of possession of the property in question. Admittedly, there was an obstruction by one Somu Pillai, son of Vaithilingam Pillai and this obstruction was notified to the Court below. Instead of taking proceedings for removal of obstruction, the petitioners herein wanted to prosecute the execution petition. The respondent raised a contention and it has been countenanced by the Court below that when no proceedings have been taken for removal of obstruction, the execution petition is incompetent and it cannot be prosecuted. This contention of the respondent as stated above has been accepted by the Court below and the execution petition has been dismissed. As against the order of the Court below the petitioners have filed the present revision.

2. Two questions would arise for consideration in the present revision:—(1) whether the provisions of the Code of Civil Procedure can be invoked in the contingency faced in the present case; and (2) even if the provisions of the Code of Civil Procedure cannot be invoked for the purpose of removal of obstruction caused to the execution, can the principles of the Code of Civil Procedure, be invoked and applied so as to effectuate the orders of eviction passed by the Revenue Court, under the provisions of the Pondicherry Cultivating Tenants Protection Act (IX of 1971), hereinafter referred to as the Act.

3. Shri. G. Nagarajan, learned counsel appearing for the petitioners, submits that in the absence of specific provisions either under the Act or in the Rules invoking the aid of the Code of Civil Procedure, it is not possible to bring them into operation for the purpose of aiding the execution of the orders passed by the Revenue Court under the Act, and as per rule 19 framed under the Act, "any order, decision or award passed by a Revenue Court under the Act, shall be enforceable by an officer of the Revenue Department not lower in rank than a Revenue Inspector." The Revenue Court having passed an order must be deemed to have overall powers to enforce the same. In an application for execution the obstructor must be left with independent remedies to be worked out separately.

4. Shri R. Gopalakrishnan, learned counsel for the respondent, submits that the absence of reference to the specific rules of the Code of Civil Procedure, either in the Act or in the Rules framed thereunder, need not form a bar for invoking the principles under the Code of Civil Procedure,to effectuate the orders passed by the Revenue Court and if such a procedure is not adopted, execution of the orders of the Revenue Court will become illusory and there may be successful obstruction which cannot be removed in the physical sense; and hence, construing the rules framed under the Act, it is possible to say that there should be a formal application for removal of obstruction without which the execution petition cannot be prosecuted.

5. I find that the submissions made by the learned counsel for the respondent, are tenable. Ramamurthi, J., in *Abdul Ravoof Sahib* v. *M. Kannappan and another*[1], had occasion to deal with the application of the Code of Civil Procedure, and in particular the machinery under Order 21, rules 35 and 95 to 103 of the Code of Civil Procedure, to the proceedings under the Tamil Nadu Act XXV of 1955. It would be pertinent to extract the observations of the learned Judge which in my opinion, are appropriate to be applied to the facts of the present case.

> "Rule 10 framed under the Act simply provides that an order passed by the Revenue Divisional Officer shall be enforceable by an officer of the Revenue Department not lower in rank than a Revenue Inspector and that there is no machinery like Order 21, rule 35 and Order 21, rules 95 to 103 of the Civil Procedure, Code, and the remedy of the tenant, therefore, would only be to file

1. I.L.R. (1966) 1 Mad. 538.

a suit for possession. I do not agree. Order 21, rule 35 and Order 21, rules 95 to 103 of the Civil Procedure Code (though rules of procedure) embody the basic principle of finality to litigation governing both the aspects; rights created before the proceeding and rights created during the pendency of the proceeding. The Revenue Inspector, while functioning under rule 10 acts as the delegate of the Revenue Divisional Officer, and when disputes arise in enforcing his order, the Revenue Divisional Officer himself can and must decide the dispute in the same way as a civil Court would do, while executing a decree for possession. The Revenue Divisional Officer will undoubtedly have power and jurisdiction to pass auxiliary orders which may be necessary to enforce and implement his original order for eviction and make it as efficacious as necessary. The fact that there is no specific provision does not matter. The principle of Order 21, rule 102, Civil Procedure Code, and section 52 of the Transfer of Property Act, would apply to obstruction by one in whose favour rights were created during the pendency of proceedings for eviction or for restoration of possession. It is needless to observe that if a person in possession obstructs asserting a paramount right, a right superior to the opponent in the proceedings, the unsuccessful party will have necessarily to work out his rights in a civil suit as in such cases the Revenue Divisional Officer cannot embark upon an investigation of competing title. But so long as the person in possession has no such superior rights, the Revenue Divisional Officer will have undoubted jurisdiction to pass an order capable of execution against the subsequent lessee or the sub-lessee, as the case may be."

6. Ramaprasada Rao, J., as he then was, in *Muthiah Nattar* v. *N.S. Ibrahim Rowther* alias *N.S. Mohammed Ibrahim and another*[2], was concerned with a case of addition of parties and the learned Judge had occasion to deal with the application of the Code of Civil Procedure to the proceedings under the Tamil Nadu Cultivating Tenants Protection Act (XXI of 1955). It must be pointed out that the provisions of the Tamil Nadu Act (XXV of 1955) and the Rules framed thereunder, can be said to be substantially *in pari materia* with the provisions of the Pondicherry Cultivating Tenants Protection Act (IX of 1971) and the Rules framed thereunder. In the context of the case dealt with by him, the learned Judge observed as follows:

"The Madras Cultivating Tenants Protection Act being a special Act, affords relief to tenants under particular stated circumstances and therefore, ought to be strictly construed. Rule 8 of the Madras Cultivating Tenants Protection Rules, ordains that every Court constituted under the Madras Cultivating Tenants Protection Act, shall have the powers exercisable by a civil Court in the trial of the suits and in particular provides under rule 8 (*ii*) that the proceedings before the Rent Court shall, 'as far as possible' be governed by the provisions of the Code of Civil Procedure, 1908. We are here concerned with the addition of parties expressly provided for in rule 8 (*ii*) (e) of the Madras Cultivating Tenants Protection Rules. It is common ground that unless there is anything in the Madras Cultivating Tenants Protection Act or the Rules, prohibiting the application of any provisions of the Code of Civil Procedure, the Code is applicable to the proceedings in the Revenue Court. No doubt, the provisions of the Code of Civil Procedure, ought not to be strictly iron-jacketed and rendered inelastic. As the Code is mainly concerned with procedural law, intended to facilitate justice, its application has to be sought instead of being avoided, if it is so required in the interests of justice, *Sangram Singh* v. *Election Tribunal*[1]. But if a special or local law provides a procedure which is defined, distinct and separate and is in conflict with the common law provision as envisaged under the provisions of the Code of Civil Procedure, then of course, the former will prevail. *Generalia specialibus non derogant* is an accepted principle of law. A proceeding before a Rent Court though not strictly a suit is certainly a legal proceeding wherein valuable justiciable rights of parties are adjudicated upon. Therefore, it has to be considered whether the impact of the Code of Civil Procedure, as against the provisions of the special beneficial legislation of the Madras Cultivating Tenants Protection Act is so great and telling that the Code should prevail over the special provisions under the Madras Cultivating Tenants Protection Act."

1. (1968) 1 M.L.J. 190.

1. 1955 S.C.J. 431: (1955) 2 M.L.J. (S.C.) 13: (1955) 2 S.C.R. 1: A.I.R. 1955 S.C. 425.

7. In *Shanmugathammal and others etc.* v. *Valliappan alias Vallinayagam and others etc.*[1], Ramanujam, J., held that rule 8 (1) of the Rules framed under the Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955) says that every Court constituted under the Act shall have the powers exercisable by a civil Court in the trial of a suit. This observation of the learned Judge indicated that even though all the provisions of the Code of Civil Procedure, have not been specifically invoked for the purpose of proceedings under the Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955) and the Rules framed thereunder, on general principles, it is possible to invoke the aid of the Code of Civil Procedure to properly effectuate the proceedings under the said Act and the orders passed by the Tribunal constituted under the said Act. A similar view has been taken by Maharajan, J., in *Kumarasami* alias *Muthukumaraswami* v. *Theagarajan*[2]. The learned Judge observed as follows:

> "It is contended on behalf of the respondent that the Revenue Court is untrammelled by the rules of procedure laid down in the Civil Procedure Code. I am unable to agree. In the first place, even apart from the Code, common sense required that order shall not be passed in favour of or against dead person, because such orders will lead to starting difficulties in execution."

8. The observations of the learned Judge also lend support to the view that even though no specific reference to the particular provisions of the Code of Civil Procedure, have been made in the Act or in the Rules framed thereunder, yet for the proper conduct of the proceedings before the Revenue Court constituted under the Act and to effectuate and execute orders passed by the Revenue Court under provisions of the Act and the Rules framed thereunder, there is always the possibility of invoking the aid of the provisions of the Code of Civil Procedure, and such an application cannot be ruled out on a proposition that the Act and Rules do not refer to them.

9. In the present case, the Court below pointed out that there is an obstruction caused by one Somu Pillai, son of Vaithilingam Pillai and it would be a misnomer to say that the execution must be effected irrespective of obstruction. Putting into practice such a proposition will present great difficulties and it may even lead to affray and disturbance of peace. Hence, while effectuating and executing orders passed by the Revenue Court, if there is an obstruction caused, it would be, apart from specific invocation of the aid of the Code of Civil Procedure, on general principles also, proper to observe the Rules of the Code of Civil Procedure, and determine the rights of the obstructor after hearing him and then effectuate and execute the orders. In this view, I find that the Court below has properly appreciated the position in law and it cannot be stated that the order of the Court below suffers on account of want of jurisdiction or error of law. I do not find any warrant for interference. Hence this revision is dismissed.

10. However, Shri G. Nagarajan, learned counsel appearing for the petitioner, submits that the petitioner may be given an opportunity to file the requisite application for removal of obstruction and for that purpose, sufficient time may be given. Taking into consideration this representation, the matter, *viz.*, E.P. No. 9 of 1973 in O.P. No. 22 of 1972 will stand remitted back to the Revenue Court, Karaikkal, and the petitioner is given the liberty to file the requisite application for removal of obstruction within a fortnight from the receipt of the records by the Court below failing which the order of the Court below will stand confirmed and the order of dismissal of the E.P. will stand. As far as the application for removal of obstruction is concerned, it shall be disposed of in accordance with law. There will be no order as to costs in this revision.

S.J. ——— *Revision dismissed*

1. (1971) 2 M.L.J. 149.
2. (1972) 1 M.L.J. 166.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Govindan Nair, CJ. and Varadarajan, J.*

Raman Nadar *alias* **Chellakannu Nadar** .. *Appellant**

v.

Kanakammal Nadachi and others .. *Respondents.*

Limitation Act (XXXVI of 1963), Art. 136—Final decree passed on 30th June, 1955—Decree amended on 27th September, 1961—Execution petition filed on 12th March, 1966, whether barred by limitation.

Held: By virtue of section 31 of the Limitation Act of 1963 the decree not having been barred, when the Act came into force on 1st January, 1964, a fresh period would have commenced on 27th September, 1961, in the instant case and there was time to file an execution petition till 26th September, 1964. It is the provisions of the Limitation Act of 1963 that will have to be applied in determining whether the execution was barred by limitation or not. Under Article 136 of the Limitation Act of 1963 the period is 12 years from the date on which the decree or order hadbecome enforceable. The execution petition has been filed within 12 years of the final decree dated 30th June, 1955 and is within time. [*Para.* 3.]

Cases referred to:—

Paladugu Veera Ramachandra Rao v. *Paladugu Parasuramayya*, (1940) 1 M.L.J. 235: 51 L.W. 173: I.L.R. (1940) Mad. 349: A.I.R. 1940 Mad. 127; *Ramayan Dubey* v. *Chitradeo Raj*, A.I.R. 1969 Pat. 85; *Sureshwar Prasad Bhakal* v. *Maharaj Bahadur Sinha*, A.I.R. 1937 Cal. 581.

Appeals under Clause 15 of the Latters Patent against the order dated 20th November, 1970 of Mr. Justice Ganesan and made in A.A.A.O. Nos 33 and 34 of 1968 preferred against the order of the District Court, Kanyakumari at Nagercoil, dated 11th August, 1967 and made in C.M.A. Nos. 119 and 126 of 1966 respectively, (E.P. No.192 of 1966 and E.A. No. 285 of 1966 in E.P. No. 192 of 1966 in O.S No. 318 of 1114 M.E. respectively, District Munsif, Padmanabhapuram).

*L.P.A. Nos. 57 and 58 of 1971. *25th October*, 1977.

T.R. Mani, for Appellant.

Thiagarajan for *P. Ananthakrishnan Nair*, for Respondents.

The Judgment of the Court was delivered by

Govindan Nair, CJ.—These appeals arise from orders passed in execution of a decree for partition. The final decree was passed on 20th June, 1955, and this fact is admitted by both sides. As per the final decree item 4 of the plaint schedule was allotted to the 7th and 12th defendants in the case. The 7th defendant died and his legal representative the 14th defendant was impleaded. The 14th defendant sold item 4 on 26th September, 1966 to the 16th defendant, who is the appellant before us in both these appeals. Proceedings were taken for what is called amendment of the decree, namely the decree, dated 30th June, 1955 by stating that item 4 in the plaint has to be allotted exclusively to the 14th defendant and not to his predecessor the 7th defendant and the 12th defendant together. The request for amendment was allowed on 27th September, 1961 and the decree was passed in favour of the 14th defendant, the legal representative of the 7th defendant, allotting item 4 exclusively as the share of the 7th defendant. An execution petition, E.P. No. 192 of 1966 was filed on 12th March, 1966 by the appellant in these two appeals. L.P.A. No. 57 of 1971 relates to the question of limitation regarding that execution petition. The appellant therein, who is also the appellant in L.P.A. No. 58 of 1971, has filed another application, E.A. No. 285 of 1966, for recognising him as the representative of the 14th defendant by reason of the sale of item 4 in his favour by the 14th defendant. The prayers in E.P. No. 192 of 1966 and E.A. No. 285 of 1966 were refused by the execution Court, by the first appellate Court and also by this Court in civil miscellaneous second appeals.

2. The judgment of this Court in the civil miscellaneous second appeals relied on a Full Bench decision of this Court reported in *Paladugu Veera Ramachandra Rao* v. *Paladugu Parasuramayya and another*[1], in support of its conclusion that the decree was barred by limitation. With great respect we are unable to agree with this view.

1. (1940) 1 M.L.J. 235: 51 L.W. 173: I.L.R. (1940) Mad 349: A.I.R. 1940 Mad. 127.

The first question that arises for consideration is whether there has been an amendment of the decree. Counsel for the respondents contended, on the basis of the decisions reported in *Ramayan Dubey and others* v. *Chitradeo Raj and others*[1] and *Sureshwar Prasad Bhakal* v. *Maharaj Bahadur Sinha*[2], that the amendment effected in this case cannot be considered to be substantial or material. He said that the changes effected were clerical in nature and unsubstantial and have not really effected any substantial change in the decree. In the Patna decision, the first decree itself provided, that in default of the payment of the amount agreed by the compromise, the terms of which had been accepted and a decree passed in terms thereof the plaint amount and interest thereon at 8 annas per cent. per mensum as further interest on that amount would have to be paid. What was called an amendment was really an incorporation of the terms of the decree when default of payment of the amount in the compromise had not been made. There was thus no change at all in the decision in that case and it was idle to have contended that there was an amendment of the decree, because no change at all was effected.

3. In the Calcutta case, one of the defendants-judgment-debtors was wrongly described and also the suit number had been given wrongly. These were corrected and were treated as purely clerical errors not resulting in the amendment of the decree. The Court also observed that notwithstanding these errors, nothing prevented the decree being executed and held the view that there was really no amendment of the decree for the purpose of item 4 in column 3 of Article 182 of the Limitation Act, 1908. It is not for us to consider whether that view is correct or not and we express no opinion thereon. But we are clear in our minds that the decree which has provided that item 4 will be allotted to the 7th and 12th defendants is a decree quite different and distinct from the decree which allotted that item exclusively to one of them. A change made by virtue of an application, which gave the item of property exclusively to one of the defendants created a new position which is quite different from the original position under the original decree. We have no hesitation in holding that the original decree was amended. It is on this basis that we have to consider the provisions of law that are applicable. When the amendment was made on 27th September, 1961, the Indian Limitation Act, 1908, was in force. It was conceded by counsel for the respondents that if there was an amendment of the decree, and we hold so, from 27th September, 1961 a fresh period of limitation will commence attracting item 4 of column 3 of Article 182 of that Limitation Act. So, the decreeholder would have had time till 26th September, 1964 to file an application for executing the decree, whether the decree to be taken is the one passed on 30th June, 1955 or the one passed on 27th September, 1961, when E.P. No. 192 of 1966 was filed, the 12 year period from 30th June, 1955 had not elapsed and section 48, Civil Procedure Code,even if it had been available, would not have stood in the way of the execution being proceeded with. But section 48 was not available having been deleted by the Limitation Act of 1963 with effect from 1st January, 1964. So, the implication of the rule contained in that section of the Code of Civil Procedure, need not be considered by us, and we are of the view that the Full Bench decision relied on by counsel for the respondents, where the implication of that section had been considered, is of no application whatever. The sentence in the judgment that was relied on, namely, "A correction under section 152, Civil Procedure Code, made in a time-barred decree still leaves the decree time-barred and does not have the effect of starting a fresh period of limitation" can apply only for the purpose of section 48. The learned Judges cannot be understood to have said that a correction under section 152, Civil Procedure Code, which would amount to an amendment of the decree, would not have the effect of providing a fresh starting point of limitation as specifically provided for in item 4 of Column 3 of Article 182 of the 1908 Limitation Act, and we do not think that there is anything in the judgment to indicate that they have said so. The decision can only be of use for the purpose of determining the ambit of scope of section 48 of the Civil Procedure Code. By virtue of section 31 of the Limitation Act of 1963 the decree not having been barred, when that Act came into force on 1st January, 1964 a fresh period would have commenced on 27th September, 1961 and there was time to file an execution application till 26th September, 1964. It is the provisions of the Limitation Act of 1963 that will have to be applied in

1. A.I.R. 1969 Pat. 85.
2. A.I.R. 1937 Cal. 581.

determining whether E.P. No. 192 of 1966 dated 12th March, 1966 was barred by limitation or not. Under Article 136 of the Limitation Act of 1963 the period is 12 years from the date on which the decree or order has become enforceable. We will assume that the decree to be considered is the one that has been passed on 30th June, 1955. We have already said that that was not barred on 1st January, 1964. So Article 136 has to be attracted. The execution petition has been filed within 12 years of the final decree dated 30th June, 1955. No other question arises and so the application is within time and the execution should have been allowed to proceed.

4. The appellant being a transferee of the rights of the 14th defendant, who, as the legal representative of the 7th defendant, got the right to have item 4 in the plaint, is entitled to execute the decree and by virtue of the sale in his favour he should have been recognised and he should have been allowed to execute the decree. In other words, E A. No. 285 of 1966 also should have been allowed.

5. In the light of the above, we set aside the orders of all the three Courts and allow these appeals and hold that the decree is not barred by limitation and allow E.A. No. 285 of 1966 and direct the execution Court to proceed with E.P. No. 192 of 1966 dated 12th March, 1966. These appeals are disposed of on the above terms.

6. We direct that the appellant be paid his costs in all the Courts by the plaintiff-respondent. C.M.P. Nos. 4209 to 4216 of 1974 ordered.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

Varudayammal .. *Appellant**

v.

Balasubramania Gounder .. *Respondent.*

Specific performance—Suit for — Oral agreement to reconvey property sold—Time for reconveyance not specified—Agreement, whether valid—Where no time is fixed reasonable time to be inferred—Vendor demanding reconveyance after more than 10 years—Vendor guilty of supine indifference— Abandonment of right inferred.

The plaintiff-appellant sold the suit property to the respondent on 9th March, 1955 for Rs. 3,000 on the understanding that the respondent would reconvey the property whenever the appellant paid the sum of Rs. 3,000 and asked for reconveyance. In 1965, the plaintiff demanded reconveyance on payment of Rs. 3,000 but the respondent refused to reconvey the property. According to the plaintiff the agreement was oral. Thereafter, the plaintiff filed the suit for specific performance. Both the trial Court and the lower appellate Court held that there was an oral agreement to reconvey the property. The trial Court decreed the suit, but the lower appellate Court held that the agreement was not enforceable as no time was fixed for the reconveyance and dismissed the suit.

On second appeal,

Held, when the parties who entered into such an agreement did not provide for the period within which such exercise of option should be made by one party, the contract itself could not be said to be invalid. Decisions have taken the view that when the parties did not prescribe a time-limit and actually provided for one party demanding the enforcement of the right at any time, the Courts should consider the contract as having provided for the exercise of the option within a reasonable time. Of course what constitutes a reasonable time would always be a question of fact. [*Para.* 4.]

An agreement to reconvey stands on a different footing from an agreement to sell. In the latter case so long as the person who has

*S.A. No. 930 of 1975. 16*th August,* 1978.

agreed to sell the property had not disposed of the property in favour of a third person or had not altered his position on the basis that the other party had decided to abandon his right, there is nothing inequitable in granting the relief of specific performance in favour of the other party. On the other hand, in the case of an agreement for reconveyance, it was a privilege conferred on the original vendor and a concession shown to him. In the exercise of that concession or privilege, a greater degree of strictness in ascertaining the intention of the party as to whether he meant to enforce the privilege or concession granted in his favour had to be applied in coming to the conclusion, whether a decree for specific performance should be granted even after a lapse of long period. In the present case, the appellant had not given any reason for not having exercised her right earlier and in such a context, the Court held that it was not a question of mere delay in the present case but a supine indifference on the part of the appellant herein from which an abandonment of right to enforce the agreement of reconveyance could be readily inferred. The second appeal was dismissed. [*Para.* 9.]

Cases referred to:—

Madan Setty Satyanarayana v. *G. Yelloji Rao*, (1965) 2 S.C.J. 678: (1965) 2 An. W.R. (S.C.) 145: (1965) 2 M.L.J. (S.C.) 145: (1965) 2 S.C.R. 221: A.I.R. 1965 S.C. 1405; *Kantilal C. Shah* v. *Devarajulu Reddiar*, (1977) 2 M.L.J. 484; *Arjuna Mudaliar* v. *Lakshmi Ammal*, (1948) 2 M.L.J. 271: 61 L.W. 601: A.I.R. 1949 Mad. 265.

Appeal against the decree dated 26th July, 1974 of the Additional District Court, Salem in Appeal Suit No. 113 of 1972 preferred against the decree dated 21st December, 1975 of the Court of the Principal District Munsif, Salem in Original Suit No. 817 of 1967.

Raj and *Raj*, for Appellant.

M. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT:—In this second Appeal, the matter lies within a very narrow compass. Admittedly, the appellant herein had sold the suit property to the respondent under the original of Exhibit A-1 dated 9th March, 1955. Her case was that the property on the date of sale was more valuable than the consideration she received from the respondent herein namely Rs. 3,000 and the understanding between the parties was that the respondent should reconvey the property whenever the appellant paid an amount of Rs. 3,000 and asked for such a reconveyance. There was a further case that she was allowed to be in possession of the property paying Rs. 300 per year as rent, the said sum of Rs. 300 having been calculated on the basis of interest at 10 per cent. for Rs. 3,000 and that she had leased the coconut trees to others, but subsequently carried on personal cultivation. In 1965, she demanded reconveyance on payment of Rs. 3,000 but the respondent refused to reconvey the property and hence she filed the suit for specific performance of the agreement to reconvey. According to her, the agreement of reconveyance was oral.

2. The respondent in his written statement contended that the transaction was an outright sale and that there was no oral agreement of reconveyance of the suit property.

3. Both the Courts below have concurrently come to the conclusion that there was an oral agreement to reconvey the property. In view of this conclusion, the trial Court decreed the suit. However, on appeal preferred by the respondent herein, the learned Additional District Judge of Salem reversed the conclusion. His view was that no doubt there was an oral agreement, but according to the oral agreement as claimed by the appellant herself, no time was fixed for obtaining the reconveyance and consequently the agreement is neither valid nor enforceable in law. The learned Additional District Judge accepted the contention of the respondent and held that the agreement of reconveyance pleaded by the appellant was rather vague and as per the terms of the oral agreement pleaded by the appellant, there was no chance for the respondent to know at what particular point of time, his title would become absolute or when the appellant would exercise her option to re-purchase the suit property. In view of this, the learned Judge took the view that, time being the essence of the contract and in the absence of stipulation of time within which the suit property is to be reconveyed by the respondent to the appellant it must necessarily be held that the agreement in this case, although true, was not valid and enforceable in law. In view of this conclusion, he allowed the appeal and dismissed the suit instituted by the appellant. Hence the second appeal by the plaintiff.

4. Both the Courts below have concurrently held that there was an oral agreement of reconveyance and that finding, being one on a

question of fact, will stand in the second appeal. Notwithstanding this, I am of the opinion that the learned Additional District Judge was not right in holding that the agreement in question was not valid and enforceable in law. As I pointed out already, the only ground the learned Judge assigned for coming to the conclusion that the agreement was not valid and enforceable in law is that the agreement, even according to the appellant, did not prescribe the period for execution of the reconveyance and time being the essence of the contract, this uncertainty and vagueness would vitiate the contract. In my view, when the parties who entered into such an agreement did not provide for the period within which such exercise of option should be made by one party, the contract itself cannot be said to be invalid. Decisions have taken the view that, when the parties did not prescribe a time-limit and actually provided for one party demanding the enforcement of the right any time, the Courts must consider the contract as having provided for the exercise of the option within a reasonable time. Of course what constitutes a reasonable time will always be a question of fact.

5. In this particular case, I must proceed on the basis that there was an oral agreement to reconvey the property and the parties agreed that the right to demand reconveyance should be exercised within a reasonable time. On the facts of this case, there has been nearly an interval of eleven years from the date of the sale under the original of Exhibit A-1 to the date of the demand made by the appellant for reconveyance. The question for consideration is whether, under these circumstances, the appellant would be entitled to a decree for specific performance of the oral agreement for reconveyance at all.

In *Arjuna Mudaliar* v. *Lakshmi Ammal and others*[1], a Bench of this Court observed as follows:—

> "It is now well-established that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant."

In that particular case, the delay was 22 years. Still the learned Judges held that the plaintiff was entitled to a decree for specific performance, because it was probable that the parties thought that the transaction amounted to a mortgage and had a period of 60 years to redeem the mortgage and recover possession and, if that was likely to be the consciousness of the parties, then certainly the delay of 22 years cannot lead to an inference of an abandonment of his rights by the plaintiff. In this particular case, the specific and categorical case of the appellant was that the original of Exhibit A-1 was only a sale deed and she never put forward a case that the transaction amounted to a mortgage.

7. In *Madan Setty Satyanarayana* v. *G. Yelloji Rao and others*[1], the Supreme Court observed as follows:

> "While in England mere delay or laches will be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression 'waiver' in its legally accepted sense namely, 'waiver' is contractual and may constitute a cause of action: it is an agreement to release or not to assert a right:"

8. On the basis of this judgment, Mr. M. Srinivasan appearing for the respondent, contended that waiver and abandonment are not the only grounds on which relief can be denied to a plaintiff who comes to the Court with a prayer for specific performance of the agreement, but even on the ground of delay or conduct which would have the effect of causing prejudice to the defendant in the event of the suit being decreed, relief can be declined.

There is a subsequent Bench decision of this Court on the question of delay in *Kantilal C. Shah* v. *Devarajulu Reddiar*[2]. That was con-

1. (1948) 2 M.L.J. 271: 61 L.W. 601: A.I.R. 1949 Mad. 265 at p. 267.

1. (1965) 2 S.C.J. 678: (1965) 2 An.W.R. (S.C.) 145: (1965) 2 M.L.J. (S.C.) 145: (1965) 2 S.C.R. 221: A.I.R. 1965 S.C. 1405.

2. (1977) 2 M.L.J. 484.

cerned with a suit for specific performance of an agreement to sell. The agreement was dated 28th May, 1962 and the suit itself was filed in the year 1968. One of the pleas put forward on behalf of the defendant was the delay. In connection with that contention, the learned Judges observed as follows:—

> ' It is no doubt true that mere delay in seeking for the relief of specific performance by itself cannot be a ground for the Court to refuse to exercise its judicial discretion to grant the equitable relief. But wanton delay and unexplained silence cannot be equated to mere delay and in such cases the burden is very heavy on the plaintiff to show that he had a purpose and not a design when he kept silent and did not demand performance. It is by now established that the delay simpliciter without any breach caused to the defendant or which would not amount to abandonment or waiver does not empower the Court to refuse specific performance. But what then is abandonment? Proof of abandonment or waiver of right could be established by a course of conduct demonstrated in a given case or an attitude of wanton drift adopted by the plaintiff which by itself is an indicia of his unwillingness to involve himself further in the bargain."

On general principles, it is clear that title to any property cannot be allowed to hang in the air indefinitely creating uncertainty. If it is therefore held that in the case of an agreement to reconvey, the original vendor can demand specific performance of the agreement for reconveyance at any time he pleases, it will merely have the effect of preventing the vendee from knowing the point of time when he would become the absolute owner of the property. In other words, the agreement would be hanging as a Damocle's Sword over the head of the vendee indefinitely. It is settled law that there should not be uncertainty in relation to the title to a property. When the Court is called upon to exercise its discretion, since the decree for specific performance is only an equitable relief, though the exercise of that discretion is a judicial one, the Court will have to take into account the effect of the delay, and the consciousness of the parties as to their rights and obligations with reference to the property arising from the agreement governing the property. In this particular case, as I pointed out already, there has been a delay of 11 years and more from the date of the agreement. In the plaint, the appellant had not put forward any case as to why she did not choose to exercise the right earlier. She merely narrates that there was an oral agreement in her favour and she was put in possession of the property as a lessee and she had leased out the coconut trees to other persons and thereafter she herself was in possession of the property. In the present case it is unnecessary to consider whether she was in possession of the property or the respondent was in possession of the property. All that is necessary to consider is what exactly is the reason for the inaction on the part of the appellant herein in not demanding her right under the agreement of reconveyance for more than a period of ten years. From such supine indifference on the part of a person, who is clothed with a right which she can enforce against the other side, for such a long time, certainly an inference can be drawn that the party concerned did not retain the intention to enforce the right. Waiver will stand on a different footing. But abandonment can be more readily inferred from the conduct of a party under such circumstances. Here is a case where there has been an unexplained delay of ten years and more during which time the appellant herein had merrily kept quiet without giving any inkling whatever to the respondent herein that she intended to enforce her right under the oral agreement of reconveyance. It is worthwhile pointing out the difference between an agreement to sell the property and an agreement of reconveyance. In the case of an agreement to sell the property, so long as the person who ageeed to sell the property had not disposed of the property in favour of third parties or had not altered his position on the basis that the other party had decided to abandon his right, there is nothing inequitable in granting the relief of specific performance in favour of the other party. On the other hand, in the case of an agreement for reconveyance, it is a privilege conferred on the original vendor and a concession shown to him. In the exercise of that concession or privilege, a greater degree of strictness in ascertaining the intention of the parties as to whether he meant to enforce the privilege or concession granted in his favour has to be applied in coming to the conclusion whether a decree for specific performance should be granted even after a lapse of long periods. In the present case, as I pointed out already, the appellant had not whispered any reason for not having exercised her right earlier and in such a context, following the observations of the Bench of this Court in

Kantilal C. Shah v. *Devarajulu Reddiar*[1], **extracted already, I must hold that it is not a question of mere delay in the present case, but a supine indifference on the part of the appellant herein from which an abandonment of right to enforce the agreement of reconveyance can be readily inferred. Hence I dismiss the second appeal and uphold the dismissal of the suit instituted by the appellant herein not on the ground mentioned by the learned Additional District Judge, but for the reasons given by me in this judgment. There will be no order as to costs in this second appeal.**

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Sathiadev, J.*

C. Ramamurthi .. *Petitioner**

v.

Karuppusami and others .. *Respondents*

(A) *Civil Procedure Code* (*V of* 1908), *sections* 151 *and* 153—*Suit on promissory note filed on* 14*th November*, 1974—*Defendant s death earlier on* 5*th October*, 1974—*Suit if a nullity—Petition for correcting the provision of law and to bring legal representatives of the defendant on record—Even if legal representatives were brought on record, what is proper date of suit—Date of suit is the date on which the plaint was originally presented.*

(B) *Limitation Act* (*XXXVI of* 1963), *section* 21—*Provision—Good faith'—No averment in affidavit about good faith—Circumstances may be looked into to establish good faith.*

A suit on a promissory note executed by the first defendant was filed on 14th November, 1974, but the first defendant had died on 5th October, 1974. There was nothing to show that the plaintiff was aware of the death of the first defendant and that knowing quite well about it, he had persisted in filing the suit as against the dead person. As soon as he came to know about the death of the first defendant the plaintiff has taken out I.A. No. 265 of 1975 on 7th February, 1975, itself for bringing on record the legal representatives of the first defendant. The circumstances and the promptness with which the petitioner had taken action clearly showed that he had acted in good faith which thus stood proved. [*Para.* 4.]

The Court has under section 153, Civil Procedure Code, jurisdiction in an appropriate case to substitute the representatives of the deceased as defendants and allow the suit to proceed as against them. [*Para.* 4.]

On the aspect as to whether on impleading the legal representatives, the suit is to date back to the original presentation of the plaint, or only to the date on which the I.A. had been filed, in view of the proviso having been added to section 21 of the Limitation Act, it is clear that the Court taking into account the circumstances of the matter can always direct that the date of the filing of the suit shall date back to the original presentation of the plaint provided the application has been taken out in 'good faith'. It would not be proper to hold that merely because in the affidavit, the defendant had not used the words 'good faith' it has not been made out. What is essential to be made out is whether the petition itself had been filed in good faith or not. Apart from being averred, the circumstances of the matter can always be taken into account to find out whether the party has acted in good faith. [*Para.* 4.]

Cases referred to:—

Veerappa Chettiar v. *Tindal Ponnan*, (1908) I.L.R. 31 Mad. 86: 17 M.L.J. 551; *Konnagara Ismail* v. *Palayat Kappadakkal Porru Ammal*, (1955) 2 M.L.J. 184: 68 L.W. 500: A.I.R. 1955 Mad. 644; *Ranaj* v. *Dinshaji Dadabhai Italia*, (1960) 2 An. W.R. 268: A.I.R. 1961 A.P. 239 *Rasteli Payya Lakshmamma* v. *Raja Manukanniah*, (1975) 2 A.P.L.J. 79: 1975 An. L.T. 473: A.I.R. 1976 A.P. 65; *Gopalakrishnayya* v. *Lakshmana Rao*, (1926) I.L.R. 49 Mad. 18: 23 L.W 418: 49 M.L.J. 590: A.I.R. 1925 Mad. 1210; *Ramprasad* v. *Vijayakumar*, (1967) 2 S.C.J. 805: A.I.R. 1967 S.C. 278; *Muthu* v. *Bharath Match Works* A.I.R. 1964 Mys. 293; *Chataram* v. *Deepchand* A.I.R. 1977 Punj. 190.

Petitions under section 115, Civil Procedure Code, praying the High Court to revise the order of the Sub-Court, Erode in I.A. No 784 of 1975 in I.A. No. 265 of 1975 in O.S No. 595 of 1974 etc.

1. (1977) 2 M.L.J. 484.

*C.R.P. No. 1044 and 1045 of 1976.

1st September, 1978.

N. Srinivasan, for Petitioner.

K. Kumaraswami, for Respondent.

The Court made the following

ORDER:—These two civil revision petitions are filed against the orders passed in I.A. No. 784 of 1975 filed for correcting the provision of law, and I.A No. 265 of 1975 filed to bring on record the legal representatives of the first defendant in the suit. The Court below had dismissed the petitions on the ground that the suit was filed on 14th November, 1974, on the basis of promissory note executed by the first defendant, whereas he died on 5th October, 1974. itself, and therefore a suit filed against a dead person is '*non est*' and there can be no question of legal representatives being brought on record, Even if they are to be brought on record as legal representatives, the date of the suit will be the date on which they were brought on record and it will not date back to the date on which the suit was originally filed, *i.e.*, 14th November, 1974.

2. The counsel for the petitioner contends that so far as the I.A. No. 784 of 1975 is concerned, it was filed for correcting the cause title as "Petition under sections 151 and 153, Civil Procedure Code" instead of as petition under Order 22, rule 4, Civil Procedure Code, as originally filed. It is claimed that the petition was in fact filed invoking the provisions under sections 151 and 153, Civil Procedure Code, and the mentioning of a wrong provision of law will not result in the petition being disallowed, as has been held by this Court and also by the Supreme Court. On this aspect, there could be no dispute, and hence the Court below was in error in rejecting I.A. No. 784 of 1975.

3. Regarding I.A. No. 265 of 1975, the Court below rejected it on the ground that when a suit filed against a dead person is amended, by substituting the legal representatives, the suit must be treated as instituted on the date of the application for amendment and therefore, I.A. No. 265 of 1975 having been filed on 7th February, 1975, the suit is barred by limitation.

4. The counsel for the petitioner contends that the Court below had not appreciated the correct position of law and he refers to the decision in *Veerappa Chettiar* v. *Tindal Ponnan*[1]; *Kannagara Ismail* v. *Palayat Kappadakkal Povu Ammal*[1] *Ranaj and others* v. *Dinshaji Dadabhai Italia*[2] *Rastely Payya Lakshmamma* v. *Raja Manukanniah*[3] and also to the amendment effected to section 21 of the Limitation Act by adding a proviso to it, to show that a suit filed against a dead person, cannot be '*non est*', and if the legal representatives are brought on record subsequently, the date of filing of the suit will not be the date on which the petition to bring on record the legal representatives was filed, but would be the date on which the original plaint was instituted. No doubt in *Veerappa Chettiar* v. *Tindal Ponnan*[4], this Court had taken the view that a suit filed as against the dead person cannot be maintained and the Court has no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed as against them. But later on, when the matter came up before this Court, in *Kannagara Ismail* v. *Palayat Kappadakkal Povu Ammal*[1] Govinda Menon, J., referring to not only *Veerappa Chettiar* v. *Tindal Ponnan*[4] but also to the Full Bench decision in (*sic*) *Gopalakrishnayya* v. *Lakshmana Rao*[5], and another decision held that under section 153, Civil Procedure Code, the Court can under such circumstances permit the cause title to be amended or may return the appeal memorandum for amendment and re-presentation. The legal representatives may represent the dead persons and ask for excusing delay in presentation and it is a matter of discretion whether it would excuse the delay or not. On this aspect, the Full Bench in *Gopalakrishnayya* v. *Lakshmana Rao*[5], had dealt with thematter, which came up in appeal. The learned Judge held that the principle laid down therein can apply to the case before him and it would be applicable also to suits filed as against the legal representatives of a dead person. The three decisions of the Andhra Pradesh High Court have rested on the powers conferred under section 153, Civil Procedure Code and have chosen to follow the decision rendered by Govinda Menon, J., and it has

1. (1908) I.L.R. 31 Mad. 86: 17 M.L.J. 551.

1. (1955) 2 M.L.J. 184: 68 L.W. 500: A.I.R. 1955 Mad. 644.

2. (1960) 2 An.W.R. 268: A.I.R. 1961 A.P. 239.

3. (1975) 2 A.P.L.J. 79: (1975) An.L.T. 473: A.I.R. 1976 A.P. 65.

4. (1908) I.L.R. 31 Mad. 86: 17 M.L.J. 551.

5. (1926) I.L.R. 49 Mad. 1: 23 L.W. 418 (F.B.) 49 M.L.J. 590: A.I.R. 1925 Mad. 1210.

been held that the decision in *Veerappa Chettiar* v. *Tindal Ponnan*[1] does not bring about the correct position of law. The earlier decisions have been rendered prior to the amendment to the Civil Procedure Code and also to the amendment effected to section 21 of the Limitation Act. The decision rendered by the, Supreme Court in *Ramprasad* v. *Vijayakumar*[2] in my opinion virtually, decides the point that arises for consideration in these civil revision petitions. In paragraph 19 it refers to the powers of the Court to add a new plaintiff at any stage of the suit in the absence of the statutory provisions like section 22 of the Limitation Act of 1908 and that section 22 stood in the way of the powers of the Court. The Supreme Court observed that:—

> "The rigour of this law has been mitigated by the proviso to section 21 (1) of the Indian Limitation Act, 1963, which enables the Court on being satisfied that the omission to include a new plaintiff or a new defendant was due to a mistake made in good faith, to direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Unfortunately, the proviso to section 21 (1) of the Indian Limitation Act, 1963, has no application to this case. and we have no power to direct that the suit should be deemed to have been instituted on a date earlier than 4th November, 1958".

Therefore, even the Supreme Court felt that in matters like this, the Court should have the legal representatives brought on record as new defendants in the place of a dead person, and the date of the filing of the suit should date back to the date of its original presentation into the Court. The Supreme Court observed that section 22 of the Limitation Act stood in the way of the powers of the Court, which would mean that the Court would always try to uphold the validity of the presentation of the plaint, and the fact that the defendant was dead at the time of the filing of the suit, cannot absolve his legal representatives from being made liable for the debt, provided the claim is established on its merits. The counsel for the respondents refers to the decision rendered in *Muthu* v. *Bharath Match Works*[3] and *Chataram* v. *Deepchand*[4] to show that the 'good faith' which is referred to in proviso to section 21 of the Limitation Act must be averred and proved. It is his contention that in this case, the affidavit filed in support of the petition does not make any reference about good faith, and it has not been proved, and therefore at least on this ground, the order of the Court below deserves to be set aside. I do not think it would be proper to hold that merely because in the affidavit, the defendant had not used the words 'good faith' it has not been made out. What is essential to be made out is whether the petition itself had been filed in good faith or not. Apart from being averred, the circumstances of the matter can always be taken into account to find out whether the party has acted in good faith. In this matter the suit was filed on 14th November, 1974 and the first defendant had died on 5th October, 1974. There is nothing to show that the plaintiff was aware of the death of the first defendant and knowing quite well about it, he has still persisted in filing the suit as against the dead person. As soon as he came to know about the death of the first defendant, he has taken out I.A. No. 265 of 1975 on 7th February, 1975, itself for bringing on record the legal representatives of the first defendant The circumstances and the promptness with which the petitioner had taken action clearly show that he had acted in good faith and thus it stands proved. On the aspect as to whether on impleading the legal representatives, the suit is to date back to the original presentation of the plaint, or only to the date on which the I.A. has been filed, in view of the proviso having been added to section 21 of the Limitation Act, it is clear that the Court taking into account the circumstances of the matter can always direct that the date of the filing of the suit shall date back to the original presentation of the plaint provided the application has been taken out in 'good faith'. In this matter, I have already held that the application has been filed in good faith, and therefore the suit laid as against the legal representatives, who are the respondents herein, shall date back to the date on which the plaint was presented originally, *i.e.*, 14th November, 1974. In view of the decision in *Ramprasad* v. *Vijayakumar*[1]. I hold that the orders of the Court below deserve to be set aside and these civil revision petitions are allowed. No. costs.

R.S. ——— *Petition allowed.*

1. (1908) I.L.R. 31 Mad. 86: 17 M.L.J. 551.
2. (1967) 2 S.C.J. 805: A.I.R. 1967 S.C. 278.
3. A.I.R. 1964 Mys. 293.
4. A.I.R. 1977 Punj. 190.

1. (1967) 2 S.C.J. 805: A.I.R. 1967 S.C. 278.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

R.M.S. Jayaram .. *Petitioner**

v.

A. Narayanan and others .. *Respondents*

Civil Procedure Code (V of 1908), Order 21, rule 35 (4)—Scope—Execution of decree for possession of house—Decree-holder left in custody of movables of the judgment-debtor found in the house—Position of decree-holder and nature of liability to restore—Tenant—Judgment-debtor moving Court for the movables or their value—Maintainability of application Award of higher amount as value than that mentioned in bond taken from decree-holder and surety at time of delivery—Award, if proper.

In execution of an eviction decree against a tenant, possession of the house was given to the decree-holder after breaking open the lock under Court orders. Certain movables being found inside the house and the tenant being absent at the time, the Officer entrusted with the warrant of delivery left the movables with the decree-holder taking a bond from him and another local resident who was prepared to act as surety pending Court orders for their disposal. The security bond mentioned the approximate value of the movables as Rs. 2,100. Subsequently on failure of the decree-holder to return the movables, the tenant-judgment-debtor moved the District Munsif for an order directing the return of the movables or for their value which he reckoned at Rs. 3,751.25. In granting the prayer the District Munsif found as a fact that the movables belonged to the tenant and had been handed over to the decree-holder to deliver the same in accordance with the Court's orders. The lower appellate Court confirmed the findings and up-held the order of the District Munsif. On revision to the High Court, it was contended that the evaluation of the movables at Rs. 3,751.25 was not justified in the face of the valuation given in the security bond and the Court had no jurisdiction to entertain the tenant's application.

Held: Where the question is not about any money liability but about the delivery of certain movables, the valuation of which came in only by way of grant of an alternative relief in the event of non-delivery, even assuming that there was an accurate valuation at the time of execution, the Court is not precluded from going into the question of valuation for the purpose of granting the alternative relief while ordering delivery. [*Para.* 4.]

Order 21, rule 35 (4), Code of Civil Procedure, provides for the appropriate procedure where the holder of a decree for possession of a house finds it locked and thereupon obtains from the executing Court an order for breaking open the lock. The rule lays down the course the proceedings should take if movables to which the decree-holder is not entitled are found inside the premises. It provides *inter alia* for preparation of an attested inventory of the movables found and report by the officer entrusted with the warrant of delivery and thereafter for a notice being issued by the judgment-debtor to take delivery of the said movables. Even if this procedure had not been gone through and the tenant himself taking the initiative moved the Court for return of the said movables, that would not make for a difference in the substantive legal position relating to the decree-holder's liability. [*Paras.* 5, 6.]

It is difficult to put the liability under one or other of any of the pigeon-holes of the law. The liability of the decree-holder in such cases may be regarded as based on the doctrine of unjust enrichment or as arising out of some as yet unclassified or unnamed specimen of fiduciary obligation or as a gratuitous but compulsive bailee. [*Paras.* 6, 7.]

The Court's role may be regarded as an exercise of jurisdiction under the Civil Procedure Code or under its ever-present duty to administer the law of the land on the principles of justice, equity and good conscience. Whichever way it is regarded, the decree-holder must be compelled to return the movables to the judgment debtor or failing that to pay their just value. [*Para.* 7.]

The impugned orders are not only within the jurisdiction of the Courts below but also entirely just and quite in accordance with law. [*Para.* 7.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Nagercoil, dated 29th August, 1978 and in C.M.A. No. 47 of 1972 (B.A. No. 1298 of 1971 in H.R.C. No. 32 of 1970, Principal District Munsif Court, Nagercoil),

*C.R.P. No. 2772 of 1978. 12th December, 1978.

T.R Rajagopalan and *T.R. Rajaraman*, for Petitioner.

The Court made the following

ORDER.—This civil revision petition arises in certain proceedings following the execution of an order of eviction obtained by a landlord against his tenant under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Under section 18 of the Act an order of eviction shall be executed by a civil Court as if it were a decree passed by it. In this case, the landlord moved the District Munsif's Court, Nagercoil, in execution, and obtained an order for vacant possession. But since the building was found locked, he moved the Court for breaking open the lock. This order was granted. The Amin of the Court then proceeded to the building, had the lock broken open, and gave delivery of possession to the landlord But at the time of delivery of vacant possession, there were found inside the premises several items of moveable property, such as paddy and rice bags, empty jute bags, cocoanuts, pieces of furniture etc., belonging to the tenant. Since the tenant was not there at the time to take delivery of his moveables, the Amin gave them over to the landlord and another local resident who was prepared to act as surety, taking a bond from both of them for keeping the articles in safe custody pending the orders of Court for their disposal. Subsequently, the tenant apparently called upon the landlord and also the surety to return the said articles to him. On their failure to do so, he moved the District Munsif for an order directing them to return the moveables or pay him their value, which he reckoned at Rs. 3,751.25. This application was opposed by the landlord. But the learned District Munsif overruled his objections and ordered the tenant's application. While doing so, he found as a fact, that the articles in question belonged to the tenant, that custody of those articles had been taken by the landlord and his surety from the Court Amin at the time of delivery of possession of the building and that the landlord, along with his surety, had subscribed to the security bond undertaking to deliver the articles in accordance with further directions of the Court. The learned District Munsif also accepted the tenant's value of the moveables in the custody of the landlord at Rs. 3,751 25 as against their approximate valuation in the security bond at Rs. 2,100. He accordingly passed the order directing the landlord and the surety to return the articles or pay their value to the tenant.

2. The landlord appealed from this order to the Sub-Court, Nagercoil. The learned Subordinate Judge dismissed the appeal. The landlord has now brought this civil revision petition, contending that this order is not in accordance with the law. He had come to this Court once before in these very proceedings, but the matter was remanded to the Sub-Court for clarification as to whether the tenant's moveables were handed over by the Amin to the landlord or not. On remand, this issue has been determined beyond all doubt. In his order, presently under revision, the learned Subordinate Judge has recorded a finding that the Amin gave the custody of the articles to the landlord and took a bond both from him and the surety. The learned Subordinate Judge has rejected the contention that only the surety took charge of the goods and the landlord signed the security bond only as an attesting witness.

3. Before me, the landlord's learned counsel, Mr. T. R. Rajagopalan, sought to question this finding. I am, however, satisfied that the finding is fully supported by the evidence of the Amin and other materials on record. not to speak of the landlord's own admission in certain affidavits filed by him.

4. Learned counsel then urged that the evaluation of the goods at Rs. 3,751.25 was not justified when the security bond itself was only for a lesser sum. I am unable to entertain this contention. The question here is not about any money liability. The question is about delivery of certain moveables The valuation of such moveables has come in for consideration only by way of grant of an alternative relief in the event of non-delivery. Hence, assuming that there was an accurate valuation of the moveables in question even at the time of the execution, that cannot now prevent the Court from going into the question of valuation for the purpose of granting the alternative relief while ordering delivery. I must, therefore, reject this contention of Mr. Rajaraman as unsound.

5. On the aspect of the landlords liability to return the goods, learned counsel had pretty little to argue. Order 21, rule 35 (4) of the Code of Civil Procedure provides for the appropriate procedure in a case where the holder of a decree for possession of a house finds the house locked and thereupon obtains from the executing Court an order for breaking open the lock. The rule proceeds to lay down what course the proceedings should take if

moveables, to which the decree-holder himself is not entitled, are found inside the premises. The rule reads as under:—

"If it is found at the time of delivery that there are moveables in the house to which the decree-holder has no claim and the judgment-debtor is absent, or if present, does not immediately remove the same, the officer entrusted with the warrant for delivery shall make an inventory of the articles so found with their probable value, in the presence of respectable persons on the spot, have the same attested by them and leave the moveables in the custody of the decree-holder after taking a bond from him for keeping the articles in safe-custody pending orders of Court for disposal of the same.

The Officer shall then make a report to the Court and forward therewith the attested inventory taken by him.

The Court shall, thereupon, issue a notice to the judgment-debtor requiring him to take delivery of the said moveables within thirty days from the date of the notice and in default they will be sold in public auction at his risk and the proceeds applied for meeting all legitimate expenses of custody and sale and the balance, if any, will be refunded to the judgment-debtor:

Provided that if moveable articles referred to above are perishable, the Officer shall sell them in public auction immediately, and bring the proceeds into Court. The notice to the judgment-debtor shall in such a case call upon him to receive the amount from Court within three months."

6. The record before me in this case does not show that after the landlord took custody of the tenant's moveables, which were found in the premises, the executing Court proceeded to issue notice to the tenant to take delivery. Assuming that this matter of procedure had not been gone through as contemplated by Order 21, rule 35 (4) of the Code, and that the tenant himself took the initiative in the matter when he moved the Court for return of his articles, that would not make for a difference in the substantive legal position relating to liability.

7. That liability can hardly be a matter for disputation or doubt, although I must confess I have found difficulty in putting it under one or other of any of the ready-to-hand pigeon-holes of the law. We no doubt start with the position that the decree-holder has custody of moveables of which he is not the owner, and, this being so he has no right to appropriate them to his own use, but he will have to restore them to their true owner. In this case, the tenant was the true owner. But he did not hand them over himself to the landlord, nor any agent or other person acting on his behalf. Nor can the decree-holder be equated to the position of a person who just finds the moveables, as a finder of lost goods, because far from their being lost by their owner, they are found in their proper place in the premises in his occupation. The Amin in charge of the execution is the person who actually hands over the goods to the decree-holder, but the Amin will be acting neither as the owner nor as the owner's agent nor as some one else entitled to proceed under the owner's authority. He is acting under the authority of the Court as a Court Officer. There is no jural relationship between the decree-holder and the Amin any more than there is, at the time of the execution, any jural relationship between him and his ex-tenant. It would seem that matters of this kind do not arise out of contract nor do they arise out of any trust, express or implied. It is difficult to say, even whether the situation fits in precisely with the requirements of any of the provisions of Chapter V of the Indian Contract Act, 1872 relating to quasi-contracts. The closest provision might seem to be found in section 72 of that Act, but the decree-holder can hardly be described even for purposes of this section as a person to whom the articles are delivered under 'coercion.' For, if the judgment-debtor were there at the time, neither he nor the Amin would be under any compulsion to hand over the goods nevertheless to the decree-holder. Again, none of the enacted provisions in the Indian Trusts Act, 1882, relating to resulting trusts and constructive trusts can in terms, be applied to this situation. Almost all the provisions dealt with in Chapter IX of the Trusts Act are of a kind which arise out of some jural relationship between persons, and the law prefers to import to one of them an obligation in the nature of trust. It cannot be said, for instance, that the decree-holder had obtained the goods of the judgment-debtor by undue influence. It cannot be said that the decree-holder had done something where his interests and duty came into conflict, None of the group of sections 80 to 94, inclusive. in the Trusts Act can literally apply to a

situation of the kind which presents itself when execution of a decree for possession of a house leaves the decree-holder with the custody of the judgment-debtor's moveables. The same position, by the way, must apply to moveables belonging to a third party found at the time of breaking open the lock, although, surprisingly, Order 21 rule 35 (4) does not specifically provide for appropriate procedure for notifying the third party of subsequent proceedings, leaving him, apparently, to follow the quite inappropriate provisions relating to third party claims to moveables which have been attached in execution. Be that as it may, it seems to me quite clear that the law does not intend to give to the decree-holder a present of the goods which he finds inside his locked house, goods to which he cannot lay claim, while assuming vacant possession of the house. It also seems quite clear to me that so long as the goods remain in his custody he has to take reasonable care of them. This duty fairly flows from the following circumstances, namely, the goods belong to some one else, he has got custody of them only to enable him to obtain vacant possession of his house, and he has to abide by the further orders of the executing Court. t also is beyond doubt that the decree-holder must restore the goods to the true owner, when called upon to do so. Order 21, rule 35 (4) provides for a 30 days' notice to be issued by the Court to the judgment-debtor to obtain redelivery of the moveables from the decree holder. But this requirement as to Court notice is only for enabling the Court to sell the moveables after the expiry of the notice period without feeling any qualms. The rule does not prevent the decree-holder from straightaway handing over the goods to the judgment-debtor, if there is no dispute or doubt over his ownership, even without the Court's intervention. Indeed, it would be the decree-holder's duty to do so. If he fails to do so, the Court has certainly the power to compel him to do so. Indeed, the Court itself is under a duty to order restoration, considering that the custody of the moveables with the decree-holder is itself but a side-effect of its order to break open the lock. Amidst all these considerations, we may regard the duty of the decree-holder in such cases as based on the doctrine of unjust enrichment; or we may regard it as arising out of some, as yet, unclassified or unnamed species of fiduciary obligation; or we may regard it as that of a gratuitous, but compulsive, bailee. As for the Court's role, we may regard it as exercising its jurisdiction under the Procedure Code, or under its everpresent duty to administer the law of the land on the principles of justice, equity and good conscience. Whichever way we regard these considerations, the result must be the same; the decree-holder must be compelled to restore the moveables to the judgment-debtor, or failing that, to pay their just valuation. I have no doubt in my mind, therefore, that the orders of the Courts below are not only within their jurisdiction, but entirely just, and quite in accordance with the law.

8. Mr. Rajaraman then submitted that the learned Subordinate Judge erred in law in directing the landlord to pay Rs. 300 by way of costs to the Amin. He said that there is no warrant in law for this kind of order. At the first blush, this direction as to costs made by the learned Subordinate Judge seemed to me to be peculiar. But after ascertaining the course of proceedings from the records, I am satisfied that this direction is also justified. The tenant, when he filed his application before the executing Court for return of his moveables, impleaded not only the landlord and the surety who had signed the security bond, also the Amin as party respondents. The learned District Munsif dismissed the tenant's application for relief as against the Amin, while granting it against the landlord and the surety. When the landlord appealed against this order, he might will have omitted to implead the Amin, but he did not do so. The Amin having been made a party to the appeal, entered appearance and had himself represented by counsel. In these circumstances, it seems to me that the learned Subordinate Judge was quite in order in directing the landlord to pay the costs of the Amin in the appeal. If a direction as to costs can be regarded as purely within the discretion of a Court, I must say that the discretion has been properly exercised in this case.

9. For all the above reasons, this revision petition is dismissed.

R.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT: *Ramanujam, J.*

Kanyalal Chandrakumar .. *Petitioner**

v.

Union of India represented by The Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue and Insurance, New Delhi .. *Respondent.*

(A) *Gold (Control) Act (XLV of* 1968), *section* 6 (1) *and* (2)—*Scope and applicability—Petitioner doing pawn-broker's business—Search of his business premises by Central Excise Officers—Unaccounted primary gold, gold coins etc., seized—Adjudication of case by Deputy Collector of Central Excise—Release of seized goods to the petitioner on payment of redemption fine—Appeal by petitioner to Collector of Central Excise rejected—Revision to Government also rejected—Order of confiscation whether sustainable.*

(B) *Gold (Control) Act (XLV of* 1968), *section* 27.

Section 6 (1) and section 6 (2) of the Gold (Control) Act are not intended to serve the same purpose. Sub-section (1) enables the Administrator if it is necessary in the public interest, to require any person who lends or advances money on the hypothecation, pledge, mortgage or charge of any article or ornament to file a return as to the receipt, delivery or sale of such article or ornament and as to the persons from whom they were received or to whom they were delivered or sold. Sub-section (2) of section 6 however, enables the Administrator to authorise any Gold Control Officer to examine the accounts relating to the receipt, delivery or sale of any gold, of any person who advances any money on the hypothecation, pledge, mortgage or charge of any article or ornament and if any gold is found in the possession of such person which is not entered in such accounts or which is not otherwise accounted for to the satisfaction of such Officer, such gold shall be deemed to be in the possession of such person in contravention of the provisions of this Act. Section 6 (2) of the Act does not refer to the return contemplated under section 6 (1) of the Act. Section 6 (2) merely authorises the Administrator to have the accounts of any person who advances money on the hypothecation, pledge, mortgage or charge of any article or ornament checked by the Gold Control Officer and to treat the amount of gold which has not been duly accounted for as excess gold. Action under section 6 (2) of the Act could be taken by the Administrator even though the person concerned has not filed any return under section 6 (1) or the return is not called for by the Administrator. Section 6 (2) of the Act makes it clear that the possession of excess gold is a contravention of the provisions of the Act and sections 71 of the Act states that such excess gold can be confiscated. [*Paras.* 4, 5.]

Section 27 (1) of the Act says that no person shall commence or carry on, business as a dealer unless he holds a valid licence issued in that behalf by the Administrator. Unless the petitioner in the instant case acted as a dealer, he is not required to take out any licence as required under section 27 of the Act. Therefore it is not possible in the instant case to say that the infringement of section 27 of the Act has been made out. [*Para.* 6.]

Held, that in this case, the petitioner cannot be held to have infringed section 27 of the Act though he has admittedly infringed section 8 (2) for having been in possession of small and negligible quantity of primary gold. The impugned order is set aside with a direction to consider, the question whether a personal penalty is called for and if so, what is the quantum of penalty to be imposed in the light of the findings and observations. The impugned order so far as it relates to the confiscation is confirmed. [*Paras.* 8, 9.]

Cases referred to :—

Badri Prasad v. *Collector, Central Excise,* (1972) 1 S.C.J 224: A.I.R. 1971 S.C. 1170; *Rayappa Goundar,* In re, (1972) 2 M.L.J. 389.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records on the file of the respondent herein in Order No. 8 of 1974, dated 12th February, 1974, and quash the said order of the respondent dated 12th February, 1974, and grant appropriate or any other relief in the matter.

D. Madanchand Chopda, for Petitioner.

T. Chengalvaroyan, Central Government Standing Counsel on behalf of Respondent.

*W.P. No. 4464 of 1974. *17th April,* 1978.

The Court made the following

ORDER.—The petitioner herein is a proprietory concern doing pawn-broker's business at No. 60, Wallajah Road, Woriyur, Tiruchirapalli. The said business premises was searched by the Officers of the Central Excise on 14th February, 1970, and unaccounted primary gold, gold coins and new and old ornaments in all weighing 1531.300 grams were seized for action under the Gold (Control) Act. The case was adjudicated by the Deputy Collector of Central Excise, Tiruchi on 3rd September, 1970, and the gold under seizure was confiscated subject to the redemption on payment of a fine of Rs. 5,000. A penalty of Rs. 2,500 was also imposed on the petitioner. In pursuance of the said order of adjudication, the primary gold, the gold ornaments and gold coins weighing in all 1531.300 grams were released to the petitioner on 23rd September, 1970, on payment of the redemption fine on 27th January, 1971. However, the petitioner filed an appeal before the Collector of Central Excise, who by an order, dated 22nd April, 1972, rejected the same. Against the rejection of the appeal, the petitioner filed a revision petition to the Government of India, who by an order dated 12th February, 1974, rejected the revision petition. The petitioner thereafter approached this Court for the issue of a writ of *certiorari* quashing the said order, dated 12th February, 1974, affirming the order of adjudication.

2. The petitioner's case is that the authorities cannot invoke section 6 (2) of the Gold (Control) Act, 1968 (hereinafter referred to as the Act) in this case, and therefore, the order of confiscation passed by the initial authority and affirmed by the appellate and revisional authorities cannot be sustained in law. It is the further case of the petitioner that there is no material in this case to indicate that the petitioner is carrying on business as a dealer without a valid licence issued on behalf of the Administrator, that therefore, there is no violation of section 27 of the Act and that as such the petitioner cannot be proceeded with for violation of the said section. As regards the alleged violation of section 8 of the Act for being in unauthorised possession of primary gold, the petitioner would say that the primary gold, possessed by it was only of a small quantity and therefore, the possession of such small and negligible quantity should be ignored. The question is whether the above contentions of the petitioner could be accepted.

3. According to the petitioner, the gold ornaments and gold coins seized from its business premises belong to one of the family members of the partners of the petitioner firm, that they have not come into its possession in the course of the pawn-broker's business, that therefore, the petitioner is not liable to keep any account with regard to those jewels and coins and that the mere fact that the petitioner has not kept any account for those jewels and coins will not lead to the inference that the petitioner has got those gold ornaments and coins in the course of its pawn—broker's busines or as a dealer doing business in gold. It is also submitted by the learned counsel for the petitioner that section 6 (2) of the Act will come into play only when directions are given by the Administrator calling for certain returns as to the receipt or sale of hypothecated gold under section 6 (1) of the Act, that in this case there having been no direction by the Administrator to the petitioner to file its returns under section 6 (1), the petitioner is not liable to account for the gold ornaments and gold coins seized from its possession, under section 6 (2) of the Act. According to the petitioner only when the Administrator calls for a return in relation to the receipt and sale of hypothecated gold under section 6 (1), he may authorise any Gold Control Officer to inspect any pawn-broker's premises and call upon the pawn-broker to account for the gold orgold ornaments found to be in excess of the stock referred to in his accounts or in the returns. Thus it is the contention of the learned counsel for the petitioner that it is only after the return is furnished by the pawn-broker as per the direction given under section 6(1) of the Act, the Administrator can invoke the machinery contemplated under section 6 (2) of the Act.

4. The learned counsel for the petitioner refers to the decision in *Badri Prasad* v. *Collector, Central Excise*[1], wherein the scope of sections 6 (1) and 6 (2) of the Gold (Control) Act, 1968 has been dealt with. In that case the Supreme Court has observed thus:

> "The provision in section 6 (1) empowering the Administrator to call upon any pawn-broker to furnish a return does not do away with his obligation to file a declaration under section 16 (1). Section 6 (1) empowers the Administrator to take action in special cases where he thinks it necessary to call upon a money lender to make a return and under section 6 (2) he is empowered to

1. (1972) 1 S. C. J. 224 : A. I. R. 1971 S. C. 1170.

authorise any Gold Control Officer to examine the accounts of such pawn-broker."

The learned counsel for the petitioner wants to emphasise the words "such pawn-broker" occurring in the observations of the Supreme Court and submits that the Supreme Court has understood section 6 (2) as consequential on section 6 (1) and not as an independent provision. But, however, on a close reading of section 6 (1) and (2) of the Act, I am inclined to hold that section 6 (1) and (2) of the Act are not intended to serve the same purpose. I do not read the above observations of the Supreme Court as laying down that section 6 (2) of the Act cannot operate without there being a previous action under section 6 (1). Section 6 (1) of the Act enables the Administrator, if it is necessary in public interest, to require any person who lends or advances money on the hypothecation, pledge, mortgage or charge of any article or ornament to file a return as to the receipt, delivery or sale of such article or ornament and as to the persons from whom they were received or, as the case may be to whom they were delivered or sold. Sub-section (2) of section 6 however enables the Administrator to authorise any Gold Control Officer to examine the accounts relating to the receipt, delivery or sale of any gold, of any person who advances any money on the hypothecation, pledge, mortgage or charge of any article or ornament, and if any gold is found in the possession of such person which is not entered in such accounts or which is in excess of the quantity shown in such accounts, and which is not otherwise accounted for to the satisfaction of such Officer, such gold shall be deemed to be in the possession of such person in contravention of the provisions of this Act. Section 6 (2) does not refer to the return contemplated under section 6 (1) of the Act. Section 6 (2) merely authorises the Administrator to have the accounts of any person who advances money on hypothecation, pledge, mortgage or charge of any article or ornament checked by the Gold Control Officer and to treat the amount of gold which has not been duly accounted for as excess gold. In my view, action under section 6 (2) of the Act could be taken by the Administrator even though the person concerned has not filed any return under section 6 (1) or the return is not called for by the Administrator. In this case it is true that the petitioner has not been called upon to file a return under section 6 (1) and an independent action has been taken under section 6 (2). The Officers of the Central Excise who have been invested with the powers under the Gold (Control) Act have found the gold and gold ornaments in excess of the quantity referred to in the accounts of the petitioner's pawn-broker's business. It is true that the petitioner gave an explanation that the gold jewels and gold coins belong to one of the family members of the partners of the firm and that since there was no sufficient safety in his residential premises, he kept the same for safe custody in the business premises. But this explanation has not been accepted by the original authority as well as the appellate or revisional authorities and therefore, it should be taken that the petitioner has not accounted for the excess gold and gold ornaments to the satisfaction of the Officers. Therefore, the petitioner has rightly been treated as having been in possession of gold and gold ornaments in contravention of the provisions of the Gold (Control) Act as per section 6 (2).

5. The learned counsel for the petitioner would say that section 6 (2) of the Act merely says that the person possessing unaccounted gold should be deemed to have contravened the provisions of the Act, that the section does not say which provision of the Act has been contravened, and that such a general deeming is not sufficient for taking proceedings against the petitioner under the Gold (Control) Act, 1968, in respect of such excess gold. However, section 71 of the Act reads thus:

> "Any gold in respect of which any provision of this Act or any rule or order made thereunder has been or is being, or is attempted to be, contravened, together with any package, covering or receptacle in which such gold is found, shall be liable to confiscation."

For the application of section 71 of the Act, it is not necessary for the Gold Control Authority to show that any particular provision of the Act has been contravened. Section 6 (2) of the Act makes it clear that the possession of excess gold is the contravention of the provisions of the Act and section 71 of the Act states that such excess gold can be confiscated. I am not therefore in a position to say that the confiscation of gold and gold jewellery in this case is illegal.

6. As regards the application of section 27 of the Act, the learned counsel for the petitioner says that mere possession by the pawnbroker of some unaccounted jewels will not make

the pawn-broker a dealer in gold and that to make him a dealer, it must be shown that such a pawn-broker is actually carrying on, directly or otherwise the business of making, manufacturing, preparing repairing, polishing or converting, gold, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration. According to the learned counsel for the petitioner excepting the allegation that the petitioner was not able to account for the gold jewels found in the business premises, no other factor has been established so as to bring the petitioner within the definition of a "dealer" as defined in section 2 (*h*) of the Act. "Dealer" has been defined under section 2 (*h*) of the Act thus:

"(*h*) 'dealer' means any person who carries on, directly or otherwise, the business of making, manufacturing, preparing, repairing, polishing, buying, selling, supplying, distributing, melting, processing or converting gold, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration."

In this case, admittedly, there is no material to show that the petitioner has been dealing in gold in any of the modes referred to in the definition of "dealer", apart from carrying on the pawn-broker's business. As already stated, the possession of unaccounted gold jewels by a pawn-broker may amount to an offence under the Act in view of section 6 (2) but it does not automatically follow that such a pawn-broker who was in possession of gold jewels which he could not account for, is a dealer in gold or gold jewels. In this case, straight-away an inference has been drawn based on mere possession of unaccounted jewels by a pawn-broker. Such an inference is not possible on the facts and circumstances of this case as there is no other material indicating that the petitioner has been dealing in gold or gold ornaments. Section 27 (1) of the Act says that no person shall commence, or carry on, business as a dealer unless he holds a valid licence issued in that behalf by the Administrator. Unless the petitioner has acted as a dealer, it is not required to take out any licence as required under section 27 of the Act. Therefore, it is not possible to say in this case that the infringement of section 27 of the Act has been made out.

7. In *Royappa Goundar*, In re[1] Maharajan, J., dealt with a case where a person who was transporting paddy without a licence was prosecuted under clause 3 (1) of the Tamil Nadu Paddy and Rice Dealers' Order, 1968 read with section 7 (1) (*a*) (ii) of the Essential Commodities Act. It was contended for the accused that clause 3 (1) of the Tamil Nadu Paddy and Rice Dealers' Order, 1968 can be invoked only if it is shown that he has been indulging in a continuity of transactions of purchase, sale or storage and that the statutory presumption contained in clause 3 (2) cannot be attracted unless it is shown that the petitioner is carrying on business as a dealer in paddy and rice. Clause 3 (2) of the Tamil Nadu Paddy and Rice Dealers' (Licensing and Regulation) Order, 1968 embodied a presumption that where stock of more than two quintals of paddy or rice is found with a given individual, he must be deemed, unless the contrary is proved, to have stored the same for the purpose of sale. Sub-clause (2) made it clear that this presumption would be available only for the purpose of sub-clause (1) of clause 3 which reads as follows:

"No person shall start afresh or carry non-business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority."

Maharajan, J., expressed the view that even if a person transported paddy without a licence he would still not be liable under clause 3 (1) of the Tamil Nadu Paddy and Rice Dealers' Order, 1968 read with section 7 (1) (*a*) (*ii*) of the Essential Commodities Act, in the absence of proof that he has been indulging in a continuity of transactions of purchase, sale or storage, that as the prosecution has failed to prove by independent evidence a single, casual or solitary transaction of transport of paddy indulged in by a person cannot be taken to make him a dealer. Therefore, the said reasoning also applies to the facts of this case where no material has at all been produced or referred to by the respondents that the petitioner has been acting as a dealer in gold or gold ornaments without a licence. Therefore, the petitioner cannot be taken to have contravened section 27 of the Act.

8. As regards the infringement of section 8 (2) of the Act for having been in possession of primary gold, as already stated, the petitioner admits possession of the primary gold which is not authorised but states that the quantity being so negligible, no action is called for

1. (1972) 2 M.L.J. 389.

under section 8 (2) of the Act. In this case, apart from the levy on the redemption on payment of fine in lieu of confiscation, the respondents have levied a sum of Rs. 2,500 as fine for the contravention of sections 8 and 27 of the Act. In this case, the petitioner cannot be held to have infringed section 27 of the Act though it has admittedly infringed section 8 (2) for having been in possession of small and negligible quantity of primary gold. Since the fine of Rs. 2,500 has been levied on the ground that there has been an infringement of a sections 8 and 27 of the Act by the petitioner, and the findings of the authorities relating to the infringement of section 27 of the Act has now been found to be not tenable, any fine that could be imposed can only be on the basis of the infringement of only section 8. Whether the infringement of section 8 alone calls for any penalty and if so what is the quantum of penalty to be levied is a matter for the 1st respondent to decide.

9. Hence, the impugned order is set aside with a direction to the respondent to consider the question whether a personal penalty is called for and if so what is the quantum of penalty to be imposed in the light of the findings and observations made above. The impugned order in so far as it relates to the confiscation is confirmed. This writ petition is allowed in part. No costs.

R.S. ——— *Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Ismail, J.*

K.P. Nalla Goundar ... *Petitioner**

v.

P. Ramaswamy and others ... *Respondents.*

Civil Procedure Code (V of 1908), Order 20, rule 8 —Suit for partition—Preliminary and final decrees passed—Subsequent application for appointment of a Commissioner for ascertaining mesne profits—Maintainability.

In a suit for partition the question of claiming mesne profits in the plaint itself cannot possibly arise, since the defendant who is a co-owner cannot be said to be in wrongful possession as against the plaintiff. [*Para.* 2.]

In a suit for partition the question of awarding Possession of properties to the parties will arise only when the properties are divided and the parties are directed to take possession of the particular items allotted to them. A preliminary decree in a partition suit merely determines the rights of the parties to a share in the properties and the particular shares to which they are entitled and the properties that are available for partition and it is the final decree which ultimately divides the properties and awards separate possession of the properties to each of the parties. [*Para.* 2.]

On the other hand, with regard to a suit for partition what is really the consequential relief will be a claim for accounting and not a claim for mesne profits. In a suit for partition the profits accruing from the different items of properties which are the subject-matter of the claim for partition will also be property to be divided among the different sharers. So long as that item of the property is not divided, the suit cannot be said to have been finally disposed of. Any decree that is passed prior to that can only be an interim final decree or one of several final decrees which came to be passed in the suit. [*Para.* 3.]

Cases referred to:—

B.N. Thiayagarajan v. *B.N. Sundaravelu*, (1972) 1 M.L.J. 230: 85 L.W. 95: A.I.R. 1972 Mad. 216; *A.R. Veerappa Goundar* v. *Sengoda Goundan*, (1975) 1 M.L.J. 53.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the I Additional Subordinate Judge, Salem dated 4th October, 1977 and made in I.A. No. 646 of 1976 in O.S. No. 114 of 1966.

K. Sengottian, for Petitioner.

H.S. Venkattachalamurthi, for 1st Respondent and Respondents 2 and 3 having been given up.

The Court made the following

ORDER.—This is a petition to revise the order of the learned Subordinate Judge, Salem dated 4th October, 1977 made in I.A. No. 646 of 1976 in O.S. No. 114 of 1966. By the impugned order the learned Subordinate Judge appointed a Commissioner for ascertaining the mesne profits. The suit itself was one for partition and a preliminary decree was first passed and

*C.R.P. No. 3126 of 1977. *7th July*, 1978.

thereafter a final decree was passed dividing the properties as between the parties. It is thereafter the present application for appointment of a Commissioner for ascertaining the mesne profits was filed and the impugned order was passed thereon.

2. The learned counsel for the petitioner challenges the impugned order on the ground that after a final decree in the partition suit there can be no separate decree in relation to the mesne profits itself. This question had come up for consideration before this Court in *B.N. Thiayagarajan* v. *B.N. Sundaravelu*[1] judgment by Raghavan, J. and in *A.R. Veerappa Goundar* v. *Sengoda Goundar*[2] judgment by N.S. Ramaswami, J. The judgment of N.S. Ramaswami, J., is a later one and he has considered the decision of Raghavan, J. Raghavan, J., after referring to certain earlier decisions stated as follows: —

> "That being the correct position I will now sum up the effect of the several decisions referred to above:
>
> (1) Where a preliminary decree awarding possession contains a direction for enquiry into the future profits, that part of the suit relating to the mesne profits continues to be pending and the decree-holder might move the Court to hold an enquiry and pass a final decree awarding such profits without the necessity of filing an application within the the prescribed period under Article 181 of the Limitation Act.
>
> (2) Where a decree awarding possession is silent with regard to enquiry into the future mesne profits and the decree has not completely disposed of the suit which for one reason or another, continues to be pending, there is nothing in the Code prohibiting the decree-holder from applying to the Court during the pendency of such suit for an enquiry into the future mesne profits of the Court from ordering such an enquiry; and
>
> (3) Where no relief for mesne profits is claimed in the plaint and the preliminary decree does not provide for such relief, the relief for mesne profits can be claimed even for the first time in application for passing a final decree. But in every case above enumerated the enquiry must be concluded before the final decree is passed, so that the result of the enquiry may be incorporated in the final decree. If, however, the final decree is passed before the enquiry into the mesne profits is completed without the result of the enquiry being incorporated in the final decree itself, there can be no second final decree incorporating the result."

From one point of view, the above statement may not be appropriate in its language to a suit for partition because in a suit for partition the question of claiming mesne profits in the plaint itself cannot possibly arise, since the defendant who is a co-owner cannot be said to be in wrongful possession as against the plaintiff. In a suit for partition the question of awarding possession of the properties to the parties will arise only when the properties are divided and the parties are directed to take possession of the particular items allotted to them. A preliminary decree in a partition suit merely determines the right of parties to a share in the properties and the particular shares to which they are entitled and the properties that are available for partition and it is the final decree which ultimately divides the properties and awards separate possession of the properties to each of the parties. From this point of view, the observation which Raghavan, J., made as the proposition of law are inappropriate to a suit for partition.

3. On the other hand, with regard to a suit for partition what is really the consequential relief will be a claim for accounting and not a claim for mesne profits. In a suit for partition the profits accruing from the different items of properties which are the subject-matter of the claim for partition will also be properties to be divided among the different sharers. So long as that item of the property is not divided, the suit cannot be said to have been finally disposed of. Any decree that is passed prior to that can only be an interim final decree or one of the several final decrees which came to be passed in the suit. That is exactly the view which N.S. Ramaswami, J., took in *A.R. Veerappa Goundar* v. *Sengoda Goundar*[1] in which the decision of Raghavan, J., in *B.N. Thiagarajan* v. *B.N. Sundaravelu*[2] was noticed. In view of this position, following the judgment of N.S. Ramaswami, J, the civil revision petition has to be dismissed and it is accordingly dismissed. No order as to costs.

R.S. *Petition dismissed.*

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1. (1972) 1 M.L.J. 230: 85 L.W. 95: A.I.R. 1972 Mad. 216.
2. (1975) 1 M.L.J. 53.

1. (1975) 1 M.L.J. 53.
2. (1972) 1 M.L.J. 230: 85 L.W. 95: A.I.R. 1972 Mad. 216.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and Sethuraman, JJ.*

Rajah Sir M.A. Muthia Chettiar .. *Appellant**

v.

R.M. Murugappan and others ... *Respondents.*

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), section 9—Ryotwari patta claimed as owner of land by virtue of book adjustment—No registered sale deed though property value was over Rs. 100—Not a landholder satisfying requirements of section 9.

A person, to be a landholder entitled to ryotwari patta under section 9 of Tamil Nadu Act XXVI of 1963, should be a person owning an estate or a part thereof or a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law. Where the appellant claimed to have become the owner of the land in question by way of a book adjustment in the ledger of a Corporation of which he was a director, the Corporation having acquired the property earlier, and though the value of the land was more than Rs. 100 there was no registered sale deed in favour of the appellant by the Corporation, he is not a landholder as contemplated by section 9 and therefore he cannot come within the scope of that section and consequently his claim for ryotwari patta under that section was not tenable. [*Paras*. 2, 3.]

Appeal under section 46 of Tamil Nadu Act XXVI of 1963 against the judgment and order dated 30th April, 1974, Special Tribunal, Inam Abolition, Ramanathapuram at Sivaganga and made in Revenue Appeal No. 306 of 1970. (S.R. No. 195/TPR/69 dated 11th May, 1970 Assistant Settlement Officer No.III, Enquiries, Karaikudi).

T. Rangaswami Ayyangar, for Appellant.

S.V. Jayaraman and the Additional Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Ismail, J.—The Assistant Settlement Officer granted a ryotwari patta in respect of the land in question under section 9 (1) (*a*) (i) of Tamil Nadu Act XXVI of 1963 in favour of the appellant herein. However, on appeal preferred by the respondents herein, the Special Tribunal, Inam Abolition, Ramanathapuram at Sivaganga, by his order dated 30th April, 1974, allowed the appeal preferred by the respondents herein and set aside the order of the Settlement Officer. It is against this order of the Tribunal, the present appeal has been filed.

2. It is not in dispute that the matter arises out of Tamil Nadu Act XXVI of 1963. Section 9 (1) of that Act deals with the right of a landholder to the grant of ryotwari patta under that Act. Section 9 (1) opens by stating, "in the case of an existing inam estate, the landholder shall with effect on and from the notified date, be entitled to a ryotwari patta in respect of." The expression "landholder" occurring in section 9 has been defined in section 2, clause (8), as follows:

"In this Act, unless the context otherwise requires, 'Land-holder'—

(*i*) in relation to an existing inam estate shall have the same meaning as in clause (5) of section 3 of the Estates Land Act;

... ...

(It is not necessary to refer to the further portions of this clause).

Thus, it will be seen that this definition throws us back to section 3 (5) of the Estates Land Act, 1908. Section 3 (5) of the Estates land Act defines the expression "landholder" as follows:

"In this Act, unless there is something repugnant in the subject or context—

'Landholder' means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law.

Where there is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of this Act or between two or more joint landholders as to which of them is entitled to proceed and be dealt with as such landholder,

*S.T. Appeal No. 258 of 1974. 4th September, 1978.

the person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector, subject to any decree or order of a competent civil Court, may recognize or nominate as such landholder in accordance with rules to be framed by the State Government in this behalf."

Thus, it will be clear that a person, to be a landholder entitled to the grant of a ryotwari patta under section 9 of Tamil Nadu Act XXVI of 1963, should be a person owning an estate or a part thereof or a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in title or of any order of a competent Court or of any provision of law. Consequently, the first question for consideration before section 9 of Act XXVI of 1963 can be applied is whether the appellant herein satisfied the definition of 'landholder' as contained in the Act.

3. It is admitted that the appellant does not have any title deed in respect of the land in question. All that is stated is that from the previous landholders viz., Thiru S.P. Subramania Chettiar and Thiru Arunachalam Chettiar, the South India Corporation Limited at Madras purchased the lands in question under Exhibit A-3 dated 6th July, 1943, and the appellant herein, who is a Director of South India Corporation Limited, became entitled to the land by virtue of a book adjustment in Exhibit A-7, the ledger of South India Corporation Limited. As we pointed out already, admittedly the South India Corporation Limited had not executed any sale deed in respect of the land in question to the appellant herein. It is not clear how the appellant can claim to have become the owner of the land in question by way of a book adjustment in the ledger of South India Corporation Limited. Equally, admittedly the property being immovable property of the value of more than Rs. 100, no title can be created in favour of the appellant over the property except by way of a registered sale deed. No such registered sale deed admittedly been has executed in favour of the appellant by the South India Corporation Limited. Consequently, the appellant cannot be said to be the owner of the estate or part thereof or a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title. There is no case that the appellant became entitled to collect the rents of the land in question by virtue of any order of a competent Court or of any other provision of law. Under these circumstances, it is clear that the appellant is not a landholder as contemplated by section 9 of Act XXVI of 1963 and therefore he cannot come within the scope of that section and consequently his claim for ryotwari patta under that section was rightly rejected by the Tribunal.

4. Mr. T. Rangaswami Iyenger, learned counsel for the appellant, then contended that in any event the order of the Tribunal granting a joint patta in respect of the several respondents cannot stand and the Tribunal should have specified the land with reference to which each one of the respondents will be individually and separately entitled to ryotwari patta. Even if we accept this argument and set aside the order of the Tribunal and remand the matter to the Tribunal for the purpose of ascertining with reference to what portion of the land which respondent will be entitled to ryotwari patta, we asked the learned counsel for the appellant how it will benefit the appellant, and the learned counsel had to concede that the appellant will not be benefited by such an order of remand. In view of this, it is unnecessary to set aside the order of the Tribunal for that purpose.

5. Under these circumstances, the appeal fails and is dismissed. There will be no order as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

The Union of India, owning the Indian Railways, represented by the General Manager, Southern Railways, Madras-3. .. *Petitioner**

v.

Messrs. Tubes and Malleables Limited, Office at 99, Armenian Street, Madras-1 and another .. *Respondents**

Limitation Act (*XXXVI of* 1963), *sections* 18 *and* 19—*Goods booked through Railway for delivery—Short delivery of goods affreighted—Open delivery certificate issued to consignor—Cheque tendered by railway for short delivery of the consignment stated by in full settlement of claims accepted—Suit for short delivery instituted within three years after the payment—Suit whether in time—Meaning of the word 'debt'—Damages based on tort or other negligence on the part of a carrier —Whether a 'debt'.*

The question was whether the receipt of a cheque tendered by a railway but said to be in full and final settlement of the claim raised by the plaintiff who received it under protest would give rise to a fresh cause of action within the meaning of one or other of he provisions of the Limitation Act.

Held: Whatever was the position prior to the passing of the Limitation Act of 1963, now sections 18 and 19 of the Limitation Act of 1963, govern the situation. Section 18 deals with the effect of acknowledgment in writing and says that, where before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was signed. Thus the section clearly contemplates that the acknowledgment of liability should be in writing and that it should be signed by the party against whom such right is claimed, when only it would have the effect of acknowledgment within the meaning of section 18. Section 19, on the other hand, deals with the effect of payments made an account of a debt before the expiration of the period prescribed by the person liable to pay or by his agent duly authorised in this behalf. In such a case a fresh period of limitation shall be computed from the time when such payment was made. For the purpose of this section 'debt' does not include money payable under a decree or order of Court. The dictionary meaning of the term 'debt' is a sum of money payable by one to another, which is other than the money payable under a decree or order of Court (this being an exception under section 19 of the Limitation Act). It is a present obligation. Unless therefore a person is obliged to pay an amount to another and unless such an amount is paid pursuant to an awakening or recognition of the existence of a present obligation in the normal sense, it would not be payment of a debt. [*Para*.5.]

In the present case, the payment was accepted under protest, but so far as the person who made the payment is concerned, he was emphatic that it was in full and final settlement. He did not reserve any obligation in respect of any future claim on the part of the payee. A voluntary act on the part of the payee by which he said that he was receiving the cheque under protest could not revive the obligation which had been extinguished by the overt act on the part of the Railway, when they sent the cheque, proclaiming contemporaneously that the payment was made in full and final settlement of the claim made by the plaintiff. [*Para*. 5.]

It was not open to the plaintiff to rely upon the payment so made by the Railway and file the suit within three years and two months from the date and then seek to sustain the case that it was not barred by limitation. [*Para*. 6.]

Cases referred to:—

Web v. *Stanton*, 11 Q.B.D. 518; *Union of India* v. *J.J. Patel and Co.*, A.I.R. 1960 Pat. 30.

Petition under section 115 of Civil Procedure Code, praying the High Court to revise the orders of the Court of Small Causes (Chief Judge), Madras, dated 20th April, 1976 and made in N.T.A. Nos. 142, 113, 112, 81, 152, 150, 132, 134, 145, 149, 151, 168, 90, 169, 171, 156, 141 of 1975 and dated 4th April, 1977, and made in N.T.A. No. 255 of 1976 respectively. (Suit Nos. 2972, 2969, 2993, 3122, 2943, 2971, 2805, 2839, 3123, 2967, 2998, 2966, 3121, 2650, 2942, 3220 and 2970 of 1974, respectively Court of Small Causes—III Judge, Madras).

*C.R.P. Nos. 3510 to 3525 of 1976, 1393 of 1977 and 1686 of 1978. 25th *October*, 1978.

P.S. Srisailam, for Petitioner.

M.P. Subramanian, for Respondent.

The Court delivered the following

JUDGMENT.—In these civil revision petitions the question which arises for consideration is a very simple one. Iron pipes were purchased by the plaintiff-respondent from a third party and it booked the same through the Railway belonging to the petitioner—Union of India, at Tatanagar, the station of destination being Bangalore and other places. It is common ground in all these cases that there was short delivery of the goods affreighted. Open delivery certificate was issued to the consignor in all these cases Except in one case where the Insurance Company has subrogated itself, in the place of the consigner, the plaintiff-respondent is the same in all the petitions. I shall deal with the relevant facts in two sets of cases, as similar points arise in them. C.R.P. No. 3510 of 1976 is against the judgment of the New Trial Bench of the Court of Small Causes, Madras, in connection with the despatch of iron pipes from Tatanagar to Bangalore. The goods arrived at Bangalore in or about November, 1970, and open delivery certificate was issued on 17th November, 1970. After protracted correspondence, which is not unusual with the Railways and Government Departments, the Railway wrote under Exhibit P-5, as follows:—

> "I have ordered the Railway's Financial Adviser and Chief Accounts Officer, to remit to you a sum of Rs. 10,439 00 in full settlement for short delivery of 177 pipes in the above consignment.
>
> As regards the remaining 8 pipes you will hear in the matter shortly."

Thereafter the plaintiff-respondent received a sum of Rs. 10,439 pursuant to the representations made earlier by the petitioner that it was in full settlement of the claim raised by the plaintiff.

2. In the other set of cases also (C.R.P. Nos. 3517 and 3520 of 1976) open delivery was sought and open delivery certificate was issued by the Railway consequent upon discovery of shortage in the goods, at the station of destination, and this certificate was issued on 18th September, 1970. Again, after protracted correspondence, the railway authorities issued a cheque for a certain sum, but stating expressly that it was in full and final settlement of the claim for refund made by the plaintiff.

3. The Court below, while dealing with the claim, thought that the payment made by cheque on 8th February, 1972, in one case, and on 10th May, 1971 and 5th March, 1971, in the other, was sufficient to decree the suit instituted by the plaintiff within three years and two months from those dates respectively, it further thought that such payment, though represented to be in full and final settlement of the claim raised by the plaintiff, could be viewed as payment towards a debt within the meaning of section 19 of the Limitation Act, 1963, and that therefore the suits instituted within three years and two months from those dates were within time. I am not recapitulating the facts in each case, as they are more or less similar, except for the difference in dates when the open delivery certificate was issued and payment by cheque was made by the Railway to the plaintiff. But the facts are slightly different in the above two sets of civil revision petitions, which are therefore separately dealt with.

4. Learned counsel for the Railway contends that the payment made by cheque on 8th February, 1972 in C.R.P. No. 3510 of 1976 and on 10th May, 1971 in C.R.P. No. 3517 of 1976 and on 5th March, 1971 in C.R.P. No. 3520 of 1976 was in full and final statement of the claim raised by the plaintiff and that therefore there was no outstanding, according to them, which was ever payable as a debt or which could be deemed to have been impliedly acknowledged as a liability or obligation on the part of the Railway thereafter to be satisfied. On the other hand, learned counsel for the respondent-plaintiff would say that, as the plaintiff had received such payments under protest, there was no automatic acceptance of the same in full and final settlement, that in fact it was an indicia to show that the plaintiff was still harping upon its earlier demand against the petitioner, that such protests and the later demands raised after receipt of the cheques were sufficient to show that the cause of action was kept alive and that the date on which the cheques were tendered to the plaintiff would give rise to a fresh cause of action. It is conceded by both sides that, if the date of the cause of action for the suit is reckoned as the date on which open delivery of the goods was given at the place of destination, then the suits have been filed beyond three years and two months from those dates. The only question therefore is whether the receipt of the cheque tendered by the

Railway, but said to be in full and final settlement of the claim raised by the plaintiff, who received it under protest, would give rise to a fresh cause of action within the meaning of one or the other of the provisions of the Limitation Act.

5. Whatever was the position prior to the passing of the Limitation Act of 1963, now sections 18 and 19 of the Limitation Act of 1963, govern the situation. Section 18 deals with the effect of acknowledgment in writing and says that, where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom, such property or right is claimed .. a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Thus the section clearly contemplates that the acknowledgment of liability should be in writing and that it should be signed by the party against whom such right is claimed, when only it would have the effect of acknowledgment within the meaning of section 18. Section 19, on the other hand, deals with the effect of payments made on account of a debt or interest on a legacy, etc. We are not here concerned with interest on legacy. Section 19 says, that, where payment on account of a debt is made before the expiration of the prescribed peirod by the person liable to pay or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when such payment was made. For the purpose of this section 'debt' does not include money payable under a decree or order of Court. The question is whether the claim raised by the plaintiff as damages based on tort or other negligence on the part of the carrier, would amount to a debt as is popularly or legally understood. The dictionary meaning of the term 'debt' is a sum of money payable by one to another, which is other than money payable under a decree or order of Court (this being an exception under section 19 of the Limitation Act). It is a present obligation. Unless therefore a person is obliged to pay an amount to another and unless such an amount is paid pursuant to an awakening or recognition of the existence of a present obligation, in the normal sense, it would not be payment of a debt. In fact, in Venkataramaiya's Law Lexicon and Legal Maxims (Second Edition), at page 605, the term 'debt' is explained thus;

"The term 'debt, is one of very wide connotation and while in ordinary parlance it may be synonymous with any obligation, whether moral or financial, whether legally enforceable or not, in the ordinary legal sense it means a sum of money payable now or which will become payable in future by reason of a present obligation."

This was the definition given as early as in 1883 in *Web* v. *Stenton*.[1] Viewed in this light, it has to be seen whether the payment made by cheque by the Railway, after correspondence with the claimant-plaintiff, but saying that it was in full and final settlement, was in recognition of a present obligation on their part, or whether it was a payment made by them without any chance of any further re-opening of the subject in future by the payee. No doubt, the payment was accepted under protest, but, so far as the person who made the payment is concerned, he was emphatic that it was in full and final settlement. He did not reserve any obligation to respect any future claim on the part of the payee. A voluntary act on the part of the payee by which he said that he was receiving the cheque under protest, could not revise the obligation which had been extinguished by the overt act on the part of the Railway, when they sent the cheque, preclaiming contemporaneously that the payment was made in full and final settlement of the claim made by the plaintiff. In these circumstances, I am unable to agree with learned counsel for the respondent that such payment accepted by him under protest did revive the cause of action and kept alive his right.

6. Reliance is placed upon the decision of the Patna High Court in *Union of India* v. *J. J. Patel and Company*[2]. That was a case where the question, which has arisen in the present case, did not squarely come up for consideration. There in answer to a claim for damages, the Railway company sent a cheque for a sum less that the amount claimed stating that it was in full and final settlement. The payee retained the cheque and encashed it. The Court held that such a conduct on the part of the payee could not be said to be conclusive proof in law that the amount was agreed to be accepted on the conditions offered, and that, if the Rail-

1. 11 Q.B.D. 518.
2. A.I.R. 1960 Pat. 30.

way Administration was liable and was bound to pay the entire claim of the plaintiffs, then it would be piling unreason upon technicality to hold, in the circumstances, that it was open to the defendant company on the ground of estoppel, to object to the jurisdiction of the Court to pass a decree in favour of the plaintiffs for the unpaid claim. Apart from the fact that the question of limitation did not arise in that case, the learned Judge was conscious of the fact that, if the Railway Administration was liable and was bound to pay the entire claim of the plaintiff, then technicalities ought not be prevail. But here in the instant case, by an open declaration in writing, that the cheque which was sent was in full and final settlement of the claim, the Railway company made it clear that there was no more obligation on their part and they were not liable to pay any a more amount in respect of the claim raised. In these circumstances, it was not open to the plaintiff to rely upon the payment as made by the Railway and file the suit within three years and two months from that date and then seek to sustain the case that it was not barred by limitation.

7. In C.R.P. No. 3517 of 1976, in which the facts are similar, open delivery certificate was given on 18th September, 1970 and payment by cheque was made on 10th May, 1971. This was again a case where the Railway made it clear that the payment by cheque was in full and final settlement of the claim. The only difference between the former case and this case is that, in the earlier one a letter was written on 28th January, 1972, stating that action had been taken to remit a certain sum of money in full settlement without any reservation, and that, regarding the remaining 8 pipes, the matter would be dealt with thereafter. This was followed up by remittance. Though there was a communication in that case to keep alive a present obligation to deal with the claim in respect of the remaining 8 pipes, yet nothing happened. In the latter case the communication sent by the Railway, enclosing the cheque for payment of the claim, which they sent on 10th May, 1971, stated in no uncertain terms that the payment was made in full and final settlement. This was therefore in the nature of a writing to the plaintiff of the stand taken by the Railway and he ought to have been diligent in coming to Court within three years and two months from the date when he secured open delivery of the goods after discovery of the shortage. This not having been done, this suit also has to be dismissed on the ground that it was filed beyond three years and two months from the date of the open delivery, which is the date of the cause of action for the suit. There was no acknowledgment in writing as contemplated in section 18 of the Limitation Act of 1963, nor was there any payment made on account of a debt, as contemplated by section 19 of the Act. Therefore the payment made on 10th May, 1971 would not save time.

8. In these circumstances, C.R.P. Nos. 3510 and 3517 and 3520 of 1976 are allowed.

9. In the rest of the petitions there was no such representation that the payment was made in full and final settlement of the claim. This would mean that the payment so made kept alive the present obligation on the part of the Railway. The lower Court was therefore right when it said that the cause of action arose on the date when the payment was made towards the present obligation and the suits having been filed within three years and two months from that date were in time. These revision petitions are therefore dismissed.

10. There will be no order as to costs in any of the petitions.

R.S. —— *Revision petition Nos.* 3510, 3517 *and* 3526 *allowed, all other petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

S.C. Basappa .. *Petitioner**

v.

Jumnadoss also known as Jumnadoss Manickchand .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 10 (2) (i) and (ii) (a)—Application by landlord for eviction—Payment of rent once in two months whether amounts to wilful default—Sub-letting by tenant not to be a matter of surmise but to be the result of actual investigation.

Though a practice of the tenant paying rent once in two months and the landlord receiving the same without demur cannot be pleaded so as to escape a petition for eviction on the ground of wilful default, yet that particular circumstance in a particular case can certainly be a ground for the tenant to set up a case that there was no wilful or contumacious conduct on his part to avoid the payment of rent. It was because of the laxity which was available to the tenant by reason of the good sense of the landlord that he was sending the rents once in two months and the rents so sent by him were accepted without demur or any objection by the landlord The default as a ground for eviction should be such that it should be so conspicuous to a reasonable person that the tenant's attitude was nothing but supreme indifference and purposeful evasiveness resulting in his recalcitrance. [*Para.* 2.]

Sub-letting cannot be a matter of surmise but such can only be the result of an investigation and adjudication and a resultant finding. [*Para.* 3.]

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of Small Causes Madras (Appellate Authority—Rent Controller), dated 12th August, 1976 and made in H.R.A. No. 87 of 1976 (H.R.C. No. 357 of 1974, Small Causes Court, Madras (Rent Controller, Madras).

*C.R.P. No. 1250 of 1977. *6th October,* 1978

C.P. Rajagopala Iyengar, for Petitioner.

A.L. Somayaji, for Respondent.

The Court made the following

ORDER.—On two grounds, firstly that there was wilful default and secondly that there was subletting without authority, the petitioner, as landlord, filed an application against the principal tenant impleading also the alleged sub-tenant as a party. By the time the application for eviction came up for hearing, it is the common case that the alleged sub-tenant vacated. The principal tenant took up the position that there was no sub-leasing at all without authority and he also denied that there was ever a wilful default. On the other hand, he pleaded that it was customary for the landlord to receive the rent once in two months and that such rents were sent by money order. The rents for the months of November and December, 1973 and January, 1974, which are subject-matters of the petition in question, were sent by money order in February, 1974, and received by the petitioner landlord on 9th February, 1974. In those circumstances, the principal tenant pleaded that there was no design or a contumacious conduct on his part in having avoided payment of the rent as alleged and, therefore, that the application should be dismissed. The Rent Controller agreed with the landlord and directed eviction on both the grounds. The Appellate Authority, however, on the very same subject, on a re-look by him, held that there was no such wilful default and no subletting as well and dismissed the application. The landlord has come up in revision as against the said order.

2. As regards the first question whether there was wilful default it is seen from Exhibits P. 1 and P. 2 series that it was usual for the tenant to send rents once in two months and the landlord was receiving the same without demur. Though a practice to that effect cannot be pleaded so as to escape a position on the ground of wilful default, yet that particular circumstance in a particular case can certainly be a ground for the tenant to set up a case that there was no wilful or contumacious conduct on his part to avoid the payment of rent. But it was because of the laxity which was available to him by reason of the good sense of the landlord that he was sending the rents once in two months and the rents so sent by him were accepted

without a demur or any objection by the landlord. The default should be such that it should be so conspicuous to a reasonable person that the tenant's attitude was nothing but supreme indifference and purposeful evasiveness resulting in his recalcitrance. Such is not the attitude of the tenant in the instant case. The Court, therefore, rightly held that the petition is not sustainable on the ground that there was such wilful default.

3. The second ground of attack was that there was subletting. Mr. Rajagopala Ayyangar fairly concedes that on the date when the application for eviction came up for hearing, the sub-tenant was not there physically. Therefore, the landlord was unable to sustain his ground under section 10 (2) (*ii*) (a) of the Tamil Nadu Buildings (Lease and Rent Control) Act. That section provides that a landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf and that the Controller, after giving the tenant a reasonable opportunity of showing cause against the application is satisfied that the tenant has after the 23rd October, 1945, without the written consent of the landlord transferred his right under the lease or sublet the entire building or any portion thereof, if the lease does not confer on him any right to do so. The question is whether a past conduct on the part of the lessee when he sublet the building without authority, would still compel him to suffer an order of eviction under the abovesaid section, if in given facts and circumstances of a case there was no such subletting or no subtenant physically in occupation of the demised premises on the date when the petition comes up for hearing. Whatever may be the truth in the pleadings of a particular case, it is essential for the landlord who seeks to secure possession under section 10 (2) (*ii*) (a) of the Act to show that on the date when he complains of sub-letting there is such sub-letting *in praesenti* and that it was provable as a physical fact. His suggestion and pleading that about the time when he came to Court or sometime before he filed the petition there was such sub-letting by the tenant without authority, cannot avail him of the right to seek for eviction under the above section. If he wishes to establish that there was such sub-letting without authority, he should prove to he first Court, namely, the Rent Controller and thereafter at every stage when the proceeding is in seisin of the statutory authorities dealing with the subject-matter that such physical fact of sub-letting is in fact in existence and the sub-letting is, therefore, at the instance of the tenant and that too without authority. Therefore, a landlord, on the mere fact that there *was* sub-letting of the premises cannot seek for an order under the above sub-section when he is unable to establish that there *is* any physical and pragmatic act of sub-letting by the tenant without authority. In the instant case, as I said, Mr. Rajagopala Ayyangar fairly conceded that on the date when the petition was taken up for hearing he was unable to establish that there was such sub-letting. The sub-letting cannot be a matter of surmise but such can only be the result of an actual investigation and adjudication and a resultant finding. I am of the view that no such finding can be rendered in the instant case, as there was no physical sub-letting at site. The petition has to fail on that ground also. The lower Court, therefore, was right in having dismissed the petition. The civil revision petition is, therefore, dismissed. There will be no order as to costs.

R.S. —— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADARS.

PRESENT:—*V. Balasubrahmanyan, J.*

Abdul Mohammed .. *Appellant**

v.

Arumugham Pillai .. *Respondent*

Civil Procedure Code (*V of* 1908), *section* 47 (2) *before its repeal—Powers of execution Court—Whether a proceeding in execution can be converted into a suit.*

Sub-section (2) of section 47 of the Code of Civil Procedure. before its repeal undoubtedly empowered the Court to convert an execution petition into a suit. But it does not mean that where an execution petition did not lie, it can nevertheless be treated as, or converted into, a suit and the trial proceeded with on the footing that it is a suit. The question whether the execution petition, in the instant case, did or did not lie has to be faced squarely and answered before the question of applicability of sub-section (2) of section 47 can be considered. Section 47 (2) is assumptive of the maintainability of execution proceedings which proceedings may at the discretion of the Court, be converted into a suit and the trial proceeded with on that footing. The provision cannot be invoked in a case where the execution proceedings themselves are found not maintainable. [*Para.* 3.]

Appeal against the order of the District Court, Pudukottai dated 5th February, 1976 and made in C.F.A. No 104 of 1974 (E.P. No. 685 of 1974 in O.S. No. 47 of 1965 on the file of the Court of the District Munsif, Pudukkottai).

S. Tyagaraja Ayyar, for Appellant.

Srivatsamani, for Respondent.

The Court made the following

ORDER.—The appellant in this second appeal, one Abdul Mohammed, and respondent Arumugham Pillai were owners of neighbouring properties. Disputes arose between them and they ended up in civil Court, each one filing a suit against the other for injunction. Both the suits were dismissed by the trial Court, and the respective appeals filed against such dismissal shared the same fate. The appellant Abdul Mohammed, however, took the matter in second appeal before this Court in S.A. No 895 of 1970. While disposing of that second appeal, this Court passed the following decree:—

"In the result, the decree of the trial Court confirmed by the lower appellate Court, is modified by granting a declaration that the suit wall belongs to the plaintiff (Abdul Mohammed) exclusively, subject to the right of the defendant (Arumugham Pillai) to rest his thatched roof thereon and that the plaintiff is further entitled to the accustomed supply of light and air through the ventilators as he has been receiving all along."

Subsequent to the disposal of the second appeal in the manner aforesaid, the appellant Abdul Mohammed, apparently was chagrined by the acts of the respondent Arumugham Pillai. He filed E.P. No. 685 of 1974 before the learned District Munsif, Pudukkottai as an execution petition arising from O.S. No. 47 of 1965 which ended up in this Court in S.A. No. 895 of 1970. In that execution petition, he asked that a Commissioner be appointed by the Court to enforce his right to air and light, which according to him, were being interfered with by the respondent Arumugham Pillai. The learned District Munsif accepted the application and appointed an Advocate-Commissioner, observing that "he is directed to carry out the direction of the High Court's judgment in S.A. No. 895 of 1970 and provide accustomed air and light to the plaintiff though the ventilators after removing any obstructions in providing the above supply". The respondent Arumugham Pillai appealed against this order appointing a Commissioner. In the appeal, he contended before the learned District Judge that on the terms of the decree passed by this Court in S.A. No. 895 of 1970, the appellant, if he had any grievance against the respondent, could only seek the remedy by way of filing a suit to enforce rights which had been declared by this Court under its decree.

It was contended that the filing of an execution petition would not invoke the requitsite jurisdiction of the Court to redress the grievance of the appellant even if it were found to be well-founded. The learned District Judge accepted this contention and held the execution petition did not lie. He accordingly allowed the appeal and dismissed the execution

*A.A.A. O No. 102 of 1976, 27th September, 1978.

petition. The appellant Abdul Mohammed has now brought this C.M.S.A against the order of the learned district Judge.

2. Mr. S. Tyagaraja Ayyar, learned counsel for appellant did not wish that I should go into the question whether a fresh suit would be an appropriate remedy or whether the matter could be agitated in execution of the decree of this Court. He referred to provisions of section 47 (2) of the Code of Civil Procedure (before its amendment by Central Act (CIV of 1976) and said that the executing Court has always the power to convert even a proceeding in execution as a suit and try it as a suit subject to proper court-fee being paid thereon on the basis that it is a suit.

3. I do not think I can accept the course of action suggested by the learned counsel either as appropriate or as legitimate. Sub-section (2) of section 47, before its, repeal, undoubtedly empowered the Court to convert an execution petition into a suit. But, it does not mean that where an execution petition did not lie, it can nevertheless be treated as or converted into a suit and the trial proceeded with on the footing that it is a suit. In other words, the question whether the execution petition in this case did or did not lie has to be faced squarely and answered before the question of applicability of sub-section (2) of section 47 can be considered. In my view, on the terms of the decree of this Court in S.A. No. 895 of 1970 all that the appellant got was a declaration of his right, among other things, to accustomed air and light to his premises. If the appellant has a genuine grievance that the right is being interfered with by the respondent, the proper remedy for the appellant in to file a suit to enforce that right. On the terms of the decree in S.A. No. 895 of 1970, it is not, if I may use the expression, self-executable. Hence, the execution petition was clearly not maintainable. Section 47 (2) is assumptive of the maintainability of execution proceedings which proceedings may at the discretion of the Court, be converted into a suit and the trial proceeded with on that footing. The provision cannot be invoked in a case where the execution proceedings themselves are found not maintainable. I am, therefore, unable to agree with the submission of the learned counsel for the appellant or accede to his request that the execution petition which his client has filed may be directed to be converted into a suit an payment of appropriate Court-fee. The result is that this civil miscellaneous second appeal must be dismissed and the order of the learned District Judge confirmed. I do so accordingly. There will, however, be no order as to costs.

R.S. —— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*M.M. Ismail, J.*

M. Masthan Rowther and others .. *Appellants**

v.

Sulaika Beevi (dead) and others ... *Respondents*

Deed—Construction—Document styled as settlement stamped as settlement and registered as a settlement —No specific clause creating interest in praesenti *—Natute of document —Document to be construed as a whole.*

When the Court is called upon to construe a document, the document has to be construed as a whole, after taking into account all provisions contained therein. One cannot merely rely upon a word here and a word there for finding out the intention of the executant of the document. Even in the absence of a specific provision in the instant case that *in praesenti* defendants 3 and 4 (children of settlor's predeceased sister) will obtain an interest in the property, such inference can be drawn from a reading of all the clauses together, because the document contemplated only such a situation. If there was no transfer *in praesenti* there was no question of the executant providing that after his death his two wives would not be entitled to claim any share in the property or the executant imposing an obligation on the third defendant to maintain him and his wives and to perform their funeral rights. Consequently, if all the clauses are read together, there can be no doubt whatever that the intention of the executant was to create an interest *in praesenti* in favour of defendants 3 and 4. [*Para.* 4.]

Held, that the document is a settlement and not a simple gift.

*S.A No. 936 of 1972. 10*th November*, 1978

Appeal against the decree dated 5th April, 1972 of the District Court (Additional District Judge) Tirunelveli in A.S. No. 87 of 1970, preferred against the decree dated 9th December, 1969, of the Court of the Additional District Munsif, Tirunelveli in O.S. No. 70 of 1969.

R. Gopalaswami Iyengar and *M. Srinivasan*, for Appellants.

T.R. Ramachandan, T.R. Rajagapalan and *S.S. Mathivanan*, for Respondents.

The Court delivered the following

JUDGMENT.—The only question involved in this second appeal is about the validity of the original of Exhibit B-2 dated 21st September, 1958, executed by one Alla Pichai. Several contentions would appear to have been advanced as to the nature of the transaction brought about by Exhibit B-2, namely, as to whether it was a gift or a will or a settlement or a family arrangement. Before the terms of this document are considered and a decision reached as to its character, it is necessary to refer to the relationship of the parties to the litigation. The plaintiff in the suit is the sister of the deceased Alla Pichai. Defendants 1 and 2 are the widows of Alla Pichai. Defendants 3 and 4 are the children of a pre-deceased sister of Alla Pichai. Defendants 5 and 6 are merely tenants of the property. Since Alla Pichai had no children, after he had died intestate, the plaintiff as the sister of the deceased Alla Pichai, would have been an heir and entitled to a share in his estate. It is in that context only that the plaintiff instituted the suit for partition. She was met with the defence that Alla Pichai had disposed of the property under the original of Exhibit B-2 and that therefore there was no property to be inherited by her. One of the points that would appear to have been considered was as to whether the original of Exhibit B-2 was a spurious document and never intended to be acted upon or not. Both the Courts below have concurrently held that it was a real transaction and not a spurious one and in view of the concurrent finding of the Courts below regarding Exhibit B-2, that question is no longer open in the present second appeal.

2. Consequently the only question that arises for consideration is, what exactly is the nature of the transaction covered by the original of Exhibit B-2 and whether it is valid or not. The appellants contended that if the transaction was a gift, there was no valid gift because there was no delivery of possession of the property, that if it was a will, it could take effect only to the extent of one-third of the estate of the deceased and not the whole of the property and that therefore the transaction would not be effective at all either as a gift or as a will. At the same time the respondents namely, the defendants had also put forward the case that the transaction was a family arrangement. Though the learned District Munsif, who tried the suit, accepted the case of the plaintiff and decreed the suit of the plaintiff for partition, on appeal preferred by defendants 1 to 4, the learned Additional District Judge of Tirunelveli reversed that conclusion and dismissed the suit. In paragraph 16 of his judgment, the learned Additional District Judge has pointed out:

> "In view of the above discussion, I hold that the original of Exhibit B-2 was a family arrangement entered into by Alla Pichai and the appellants herein (defendants 1 to 4) and that the same was supported by consideration and is valid in law".

In view of this conclusion, as I have pointed out already, the suit was dismissed by the learned Additional District Judge. Hence the present second appeal by the legal representatives of the plaintiff in the suit

3. As I have pointed out already, the only question that arises for consideration in this second appeal is, as to what exactly is the nature of the transaction brought about by the original of Exhibit B-2 and what is its legal effect. The document is styled as a settlement and is stamped as a settlement and has been registered as a settlement. The executant of the document had stated that he had married defendants 1 and 2, that he had no children through either of them, that he had brought up the children of his younger sister, defendants 3 and 4 as his own children along with his two wives defendants Nos. 1 and 2 and that after having brought them up, he had also at his own expense performed the marriage of the third defendant. He also stated that he and his wives and these two children were living as one family, that he was aged 70, that for sometime past he was suffering from illness, that since he did not feel confident that he would live for a long time, he wanted to make some provision with regard to the

property covered by the document of the value of Rs. 1,000, which was his own self acquired property during his lifetime itself and that therefore he was executing the document. The recitals in the document expressing the desire of the executant are:

(1) He and his wives, and defendants 3 and 4 were living as one family so far and they would continue to live as one family;

(2) He and his two wives will enjoy the property without subjecting it to any encumbrance or alienation;

(3) After his lifetime and the lifetime of his two wives, defendants 3 and 4 will have to take the property absolutely and in equal moieties and they will have to pay the municipal tax and also have the mutation of names effected in their favour;

(4) The third defendant will have to maintain the settlor and his two wives and perform their funeral rites;

(5) The property should be in the possession and enjoyment of the executant during his lifetime and after his death the two wives will have no right to ask for a share in the property;

(6) Since the fourth defendant's marriage had not been performed and if the executant happened to borrow any money on the security of the property, defendants 3 and 4 will have to discharge the debt; and

(7) The executant had no right to alter or cancel the provisions made in the settlement and even if he purported to do the same, that would not be valid.

It is on the basis of these recitals in the document that we have to consider the nature of the document.

4. Mr. M. Srinivasan learned counsel for the appellants, contended that since there was no dispositive clause in the document, it could not be construed either as a gift or even as a settlement, that therefore no interest in the property passed from Alla Pichai under the original of Exhibit B-2 and that, as a result, the property remained as the property of Alla Pichai at the time of his death, in which under the Mohamedan law of inheritance, the plaintiff became entitled to have a share. I am of the opinion that this argument has to be rejected. When the Court is called upon to construe a document, the document has to be construed as a whole, after taking into account all the provisions contained therein. One cannot merely rely upon one word here and another word there for the purpose of finding out what exactly is the nature of the transaction and what was the intention of the executant of the document. Even though there is no specific provision that *in praesenti* defendants 3 and 4 will obtain an interest in the property, that inference can be drawn from a reading of all the clauses together, because the document contemplated only such a situation. If there was no transfer *in praesenti* there was no question of the executant providing that after his death, his two wives would not be entitled to claim any share in the property or the executant imposing an obligation on the third defendant to maintain him and his wives and perform their funeral rites. Consequently, if all the clauses are read together, there can be no doubt whatever that the intention of the executant was to create an interest *in praesenti* in favour of defendants Nos. 3 and 4. Therefore the argument of the learned counsel for the appellants that there was no transfer of interest *in praesenti* fails.

5. If there was a transfer *in praesenti* then what exactly was the character of the transaction, whether it was a gift or a settlement. From what I have already pointed out, it is clear that the transaction was not intended to be a simple gift. The recitals themselves show that the executant and his two wives and defendants 3 and 4 were living as a single family and that he wanted to make some provision or arrangement with regard to his property during his life time. One such provision naturally concerned his two wives after his death. But for this document, his two wives, namely, defendants 1 and 2 would be his heirs and they would be entitled to have a share in the property. Secondly there is provision for consideration preceeding from defendants 3 and 4, namely, to maintain the executant and his two wives for their life and to perform their funeral rites. That will certainly constitute consideration for the interest which the executant created in favour of defendants 3 and 4. Hence whether the document can be considered to be a family arrangement in the orthodox sense or not, it is certainly a settlement and equally certainly it is not a simple gift. If it is not a simple gift, the requirement of Mohamedan Law for a valid gift will not be attracted and therefore

we have to test the validity of the transaction from the ordinary standards of general law of the land. If these standards are applied, the transaction as a settlement is a valid one and therefore the deceased Alla Pichai could not be said to have died leaving the suit property available to be inherited by his heirs.

6. In view of these circumstances, I am of the opinion that the conclusion of the lower appellate Court is correct The second appeal therefore fails and is dismissed. There will be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

Balakrishna Tawker and another .. *Petitioners**

v.

Shanmughavalli and another .. *Respondents*

Tamil Nadu City Tenants' Protection Act (III of 1922), section 9 (1), (2) and (3) — Ejectment suit by landlord—Petition by tenant for purchase of site—Court determining the value of the land—Time for payment granted—Interest payable fixed at 6 per cent—Appeal by both landlord and tenant Appellate Court modifying the price payable and fixing another period for payment of the quantified amount in instalments but silent regarding interest—Unsuccessful revision by tenant—Other formalities complied with—Petition by tenant for direction to the landlord to execute conveyance—Objection by landlord of non-payment of interest —Landlord's claim for interest on the quantified compensation—Rejected.

Section 9 (1) (*b*) of the Tamil Nadu City Tenants' Protection Act prescribes three norms to be followed by the Court while dealing with an application by the tenant. The fixation of the minimum extent of the land which the landlord should sell to the tenant if he is entitled to the benefits under the Act and while fixing the extent fix the price and after fixing the price grant a reasonable time to the tenant for payment of such quantified compensation are the prescriptions in the above sub-section. Section 9 (1) (*b*) *inter alia* says that the Court shall order that within a period to be determined by the Court, not being less than three months and not more than three years from the date of the order, the tenant shall pay the amount into Court or otherwise as directed in one or more instalments with or without interest. [*Para.* 3.]

On a fair and complete reading of the entire section, it should be understood that what the Court under section 9 (3) (*a*) is doing is only a function which is equatable to the execution of the final decree. The Court referred to therein in the instant case is the Registrar, Court of Small Causes, as it has been the tradition and practise in that Court, to post such matters before the Registrar. Even otherwise the Court referred to in section 9 (3) (*c*) is not a Court independent of or different from the principal Court which exercises appellate jurisdiction over the principal Court. It is in this context it should be stated that the statutory function contemplated in section 9 (3) (*a*) of the Act is more or less the function of an executing Court. It is fundamental that an executing Court cannot go behind the decree or the judgment of the principal Court. As in this case, the appellate judgment did not provide for interest and as the appellate Court did have jurisdiction either to grant or withhold the grant of such interest and as such nongrant of such interest had not been questioned in a manner known to law, the statutory functionary under section 9 (3) (*a*) cannot but act in accordance with the terms of the appellate judgment and decree. [*Para.* 3.]

Held, that both the Registrar and the Chief Judge, Court of Small Causes, were right in saying that the landlords are bound to execute the conveyance without demanding the interest on the quantified compensation. [*Para.* 3.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of Small Causes, Madras, dated 28th February, 1977 and made in E. A. Nos. 11 of 1976 and 12 of 1976 respectively (M. P. No. 346 of 1975 in Ejt. Suit No. 32 of 1966 and M. P. No. 345 of 1975 in Ejt. Suit No. 133 of 1976, Court of Small Causes, Madras respectively).

S. F. Rahman, for Petitioner.

P. Muthukumaraswami Mudaliar, for Respondent.

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*C. R. P. Nos. 2737 and 2738 of 1977.
24th October, 1978.

The Court made the following

ORDER.—In petitions filed by the tenants who secured the benefits under the City Tenants' Protection Act for a direction to the landlords to convey the land to them as per the directions of the principal Court which went into the matter regarding the entitlement of the tenants, the question which arose was whether the tenants-respondents were entitled to such a conveyance from the landlords without the tenants paying the interest on the amount payable by them on the amount fixed by the principal Court. The Registrar, Court of Small Causes, Madras before whom such matters as provided for under section 9 (3) of the Madras City Tenants' Protection Act, 1921 come up, was of the view that the landlords are bound to execute the conveyance inasmuch as the tenants have complied with the directions issued by the principal Court when it disposed of the petitions under section 9 (1) (*b*) of the Act.

2. In this case, the principal Court, in the sense, the Court which principally dealt with the relative entitlements of both the landlords and the tenants fixed the price, granted time for payment and thereafter directed that the amounts payable by the tenants were to carry interest at 6 per cent. per annum. Not being satisfied with the quantum fixed as also the period during which the quantified amounts were to be paid by the tenants and also the direction in regard to interest, the tenants and the landlords went up in appeal to the Chief Judge, Court of Small Causes, Madras. The appellate Court modified the price and fixed by itself another period for payment of the quantified amount in instalments but remained silent regarding the grant of interest. It is conceded before me that the tenants took up the matter further to this Court in C. R. P. Nos. 1317, 1326 and 1327 of 1971, but the tenants were unsuccessful. The point, however, is that the landlords were satisfied with the order of the Appellate Judge who quantified the just compensation and also indicated the number of monthly instalments during which the tenants had to pay such quantified compensation. Notwithstanding the fact that the Appellate Court did not express itself on the question whether interest was payable at all on such quantified compensation the landlords did not take up the matter further to this Court and the order of the appellate Judge dated 10th August, 1970, become final. After this, petitions were filed by the tenants for a direction to the landlords to convey the extent of the land for which the price was fixed and to put them in possession. It is not in dispute that the other formalities as contemplated under section 9 (3) (*a*) of the Act were complied with by the tenants. When the petitions for directions were filed by the tenants under section 9 (3) (*a*) of the Act, an objection was taken by the landlords that they were not obliged to execute the conveyance unless the interest on the qualified compensation was also paid. The contention was that the appellate Court when it passed the order on 10th August, 1970, omitted to grant interest though the principal Court granted the same and such an omission was more or less accidental and could never be said to be intentional. Both the Registrar, Court of Small Causes, and the appellate Court, namely, the Chief Judge of Court of Small Causes, did not agree with this contention. Hence the revision petitions.

3. Learned counsel for the landlords rightly brought to my notice the three primary conditions which have to be noticed by the principal Court while passing orders on an application by the tenant under section 9 of the Act. Section 9 (1) (*b*) prescribes three norms which have to be followed by the Court while dealing with an application by the tenant. The fixation of the minimum extent of the land which the landlord should sell to the tenant if he is entitled to the benefits under the Act and while fixing the extent fix the price and after fixing the price, grant a reasonable time to the tenant for payment of such quantified compensation are the prescriptions in the above sub-section. Section 9 (1) (*b*) *inter alia* says that the Court shall order that within a period to be determined by the Court, not being less than three months and not more than three years from the date of the order, the tenant shall pay into Court or otherwise as directed the price so fixed in one or more instalments *with or without interest*. It is no doubt true that the principal Court after having accepted the entitlement of the tenant to the benefits under the Act followed the prescriptions under section 9 (1) (*d*) and granted also interest. But in the appeals taken by both the landlords and the tenants against the judgment of the principal Court, the appellate Court did not grant interest. The tenants complied with the decree of the appellate Court in terms stated therein and without paying the interest sought for the conveyance under section 9 (3) (*a*). What is argued before me is that the omission to grant interest by the appellate Court can only be said to be an accidental omission and cannot be said to be a conclusion after application of the mind of

Court. Certainly I agree that the order of the appellate Court could have been more speaking in matter. But at a later stage, when the order has become final in the eye of law, it is not open to either of the parties to challenge the judgment or decree on the ground that there has been an omission, accidental or otherwise in the same. There are methods by which an omission in a judgment or a decree could be corrected. The landlords did have such opportunity at the time when the tenants came up to this Court in C.R.P.Nos. 1317, 1326 and 1327 of 1971 and they could have sought for an indulgence from this Court at the time at least that a provision for interest should be made or they could have independently taken out on application under a known provision of law for the correction of the alleged omission by the appellate Court. No such step has been taken by the landlords at any time. In these circumstances, the Registrar, Court of Small Causes or the Chief Judge of Court of Small Causes who were called upon to discharge their functions under section 9 (3) (*a*) cannot go behind the decree of the appellate Court. On a fair and a complete reading of the entire section, it should be understood that what the Court under section 9 (3) (*a*) is doing is only a function which is equatable to the execution of a final decree. The Court referred to therein, in the instant case is the Registrar, Court of Small Causes as it has been the tradition and practice in that Court, to post such matter before the Registrar. Even otherwise, the Court referred to in section 9 (3) (*a*) is not a Court independent or different from the principal Court or the Court which exercises appellate jurisdiction over the principal Court. It is in this context it should be stated that the statutory function contemplated in section 9 (3) (*a*) of the Act is more or less the function of an executing Court. It is fundamental that an executing Court cannot go behind the decree or judgment of the principal Court. As in this case, the appellate judgment did not provide for interest and as the appellate Court did have jurisdiction either to grant or withhold the grant of such interest and as such a non-grant has not been questioned in a manner known to law, the statutory functionary under section 9 (3) (*a*) cannot but act in accordance with the terms of the appellate judgment and decree. That is what has been done in this case. Both the Registrar and the Chief Judge, Court of Small Causes were right in saying that the landlords are bound to execute the conveyance without demanding the interest on the quantified compensation.

4. The civil revision petitions, therefore, fail and are dismissed. No costs.

R.S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*G. Ramanujam, J.*

S. Muthuvel .. *Petitioner**

v.

Murugesan Pillai alias **Balasubramania Pillai and others** .. *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act LVIII of 1961), section 61 *Determination of tenant's ceiling area—Petitioner holding excess land subsequent to notified date by purchase—Direction to surrender surplus land if justified—Option to select land for retention not given to the petitioner—Order of the Authorised Officer set aside.*

If on any date subsequent to the notified date a tenant came to possess either by purchase or by inheritance or otherwise any area in excess of the tenant's ceiling area, he has to submit a return as to his holding and the Authorised Officer has to proceed under section 61 of the Land Reforms (Fixation of Ceiling on Land) Act for determining the tenant's ceiling from after such acquisition. The mere fact that the tenant had alienated some of the properties from out of his holding will not deprive the right of the Authorised Officer to determine the cultivating tenant's ceiling area under the provisions of section 60 and to take over the excess under section 61. [*Para.* 3.]

Rule 51 (1) of the Act enjoins the Authorised Officer to serve on the cultivating tenant and the landowner of the land a statement in Form 30 and call for their objections But the complaint of the petitioner in this case is that he was not served with the statement in Form 30 at any time prior to the passing of the order. Since, the petitioner was not given the option to select the lands for retention within the cultivating tenant's ceiling area which he is entitled to under the rules, the orders of the Authorised Officer will have to be set aside and

*C.R.P. No. 2630 of 1976. *2nd November*, 1978

the matter has to be remitted to the Authorised Officer for giving option to the petitioner and to determine the lands to be taken over as surplus after considering his option.

[*Para.* 4.]

Petition under section 83 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, read with section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Land Tribunal (Subordinate Judge), Tiruchirapalli, dated 13th July, 1978, and made in L.T.C. M.A. No. 4 of 1976 (Case C.E.R. No. 8 of 1975, on the file of the Authorised Officer (L R.), Tiruchirapalli).

The Court delivered the following

JUDGMENT.—The first respondent herein filed an application before the Authorised Officer under section 61 of the Act bringing to his notice that the petitioner herein is having more than the cultivating tenant's ceiling area of 5 acres and requesting that the excess land over and above the cultivating tenant's ceiling area might be reverted to him as a landlord for self-cultivation. Notice of this application was issued by the Authorised Officer to the petitioner and he was asked to file his objections. The petitioner filed his objections stating that he was not in possession of any excess over and above the cultivating tenant's ceiling area, that he is in possession of 0.62 cents as owner and 3 68 acres as a lessee, and that, therefore, his total holding is only 4.30 standard acres which is well within the cultivating tenant's ceiling area as fixed under section 60 of Madras Act LVIII of 1961. The matter was taken up for enquiry by the Authorised Officer and at that stage it was found that as on the notified date *i.e.*, 2nd October, 1962, the petitioner owned 1.85 standard acres, that he purchased an extent of 0.77 cents after the notified date, that he had executed a settlement deed in respect of certain items of properties measuring 2 acres in favour of his son and that after such execution of the settlement deed he is in possession as owner of only 0.62 cents and 3.68 acres as lessee. Some of the lands held by the petitioner as lessee belong to the respondent. The extent belonging to him was 1.63 standard acres. The Authorised Officer held that the settlement deed executed by the petitioner in favour of his son was with a view to defeat the provisions of the Act and therefore, the extent of land held by him both as owner and as tenant should be computed after ignoring the said settlement deed. In that view, the Authorised Officer directed under section 61 (3) (*b*) of the Act that the respondent shall surrender possession of the lands belonging to the petitioner amounting to 2.037 acres. Since the rest of the surplus extent was less than half a standard acre, the same was ignored.

2. The petitioner filed an appeal to the Land Tribunal contending that the settlement deed executed by him in favour of his son on 14th April, 1975, has to be taken into account for the determination of the cultivating tenant's ceiling area, and that if it is done, there will not be any excess over and above the cultivating tenant's ceiling area in his hands. The Land Tribunal took the view that the settlement deed (Exhibit R. 6) executed by the petitioner in favour of his son is not a genuine document and that the same has been brought into existence with a view to defeat the provisions of the Act and to deprive the 1st respondent's right to resume his lands. The Land Tribunal, therefore, felt that there was no justification for interfering with the order of the Authorised Officer.

3. In the revision petition it is contended that the Authorised Officer as well as the Land Tribunal were not justified in holding that the settlement deed, Exhibit R. 6 executed by the petitioner in favour of his son was not genuine and that the same has been motivated In my view it is not necessary in this case to go into the question as to whether the settlement deed is genuine or whether it is purposely brought into existence with a view to defeat the 1st respondent's right to have resumption of the lands. Even if the document Exhibit R. 6 is true and valid still the question is, whether the petitioner by acquiring certain lands after the notified date came to possess any extent in excess of the ceiling area. If on any date subsequent to the notified date, the petitioner came to possess either by purchase or by inheritance or otherwise any area in excess of the tenant's ceiling area, he has to submit a return as to his holding and the Authorised Officer has to proceed under section 61 of the Act for the purpose of determination of the tenant's ceiling area after such acquisition. The mere fact that the petitioner has subsequently alienated some of the properties from out of his holding will not deprive the right of the Authorised Officer to determine the cultivating tenants ceiling area under the provisions

of section 60 and to take over the excess under section 61 of the Act. Therefore, I am inclined to hold that even if Exhibit R. 6 settlement is valid, since the petitioner's holding on the date of the acquisition was more than the cultivating tenant's ceiling area, it automatically attracts the provisions of Chapter VIII of the Act.

4. The learned counsel for the petitioner then contends that in any event, the Authorised Officer has not given him the option to select the lands for retention by him as contemplated by Form No. 30. I think there is considerable force in this submission. It is true that the petitioner has not submitted a return within three months from the date of the acquisition in respect of the extent under his holding. But that will not mean that he is not entitled to be given the option as contemplated by the rules. Form 30 which is prescribed in pursuance of rule 51 (1) of the Act specifically refers to the particulars of the land which the cultivating tenant desires to retain within the cultivating tenant's ceiling area out of the lands held by him as cultivating tenant. Rule 51 (1) enjoins the Authorised Officer to serve on the cultivating tenant and the landowner of the land a statement in Form 30 and call for their objections. But the complaint of the petitioner in this case is that he was not served with the statement in Form 30 at any time prior to the passing of the order. dat d 22nd December, 1975. Since the petitioner was not given the option to select the lands for retention within the cultivating tenant's ceiling area which he is entitled to under the rules, the orders of the Authorised Officer as well as the Tribunal will have to be set aside and the matter has to be remitted to the Authorised Officer for giving the above option to the petitioner and to determine the lands to be taken over as surplus after considering his option. In this view, the civil revision petition is allowed and the matter is remitted to the Authorised Officer for disposal in accordance with the observations made in the judgment. There will be no order as to costs.

R.S. ——— *Petition allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

V. Palaniappa Chettiar ... *Appellant**

v.

P. Vaidyanatha Iyer and others .. *Respondents.*

and

P. Vaidyanatha Ayyar .. *Appellant**

v.

V. Palaniappa Chettiar and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 34—*Suit for dissolution of partnership and rendition of accounts—Partner, if can get honorarium from firm—Interest claimed from date of plaint—Plaintiff held entitled to interest only from the date of decree.*

The plaintiff filed a suit for dissolution of partnership and for rendition of accounts. A certain item was claimed by the first defendant as exclusively belonging to him earned in his individual capacity as honorarium. The claim was rejected by the lower appellate Court. The plaintiff claimed interest from the date of the plaint. The lower appellate Court rejected the claim and granted interest only from the date of the decree.

On appeals to the High Court,

Held: The first defendant's claim was not tenable. It is difficult to appreciate what honorarium a partner can get from the firm and how he can claim that as something earned by him not in his capacity as a partner but something different. In the absence of facts throwing light, the amount must be held to have been earned by him as a partner. The appellant (plaintiff) was entitled to interest only from the date of the decree as it was not a case for rendition of accounts of a firm already dissolved but a suit for dissolution of the firm and rendition of accounts

[*Paras.* 2, 6.]

Cases referred to:—

Vincent Antony Jabamalai Fernando v. *S.A. Thomas, Fernando,* (1977) 90 L.W. 655: A.I.R 1978 Mad. 90; *Sulaiman* v. *Haji Abdul Latif,* (1930)

*S. A. Nos. 619 and 1473 of 1974. 8th *December,* 1978.

59 M.L.J. 121: 57 I.A. 245: 32 L.W. 184: A.I.R. 1930 P.C. 185; *Hakim Raj* v. *Gangaram*, (1943) 1 M.L.J. 16: 56 L.W. 121: 69 I.A. 172: A.I.R. 1942 P.C. 61.

Appeals against the decree dated 5th March, 1973 of the District Court, Coimbatore (East) at Erode in Appeal Suit Nos. 38 and 84 of 1972 preferred against the decree dated 21st December, 1971 of the Court of the Subordinate Judge (Principal), Erode in I. A No. 1866 of 1969 in Original Suit No. 47 of 1959.

K. P. Sivasubramaniam, for Appellant.

R. Gopalaswani Iyengar, for Respondents.

The Court delivered the following

JUDGMENT.—Both these second appeals arise out of the final decree proceedings in O.S. No. 47 of 1959 on the file of the Court of the Subordinate Judge, Erode. Second Appeal No. 619 of 1974 has been preferred by the first defendant in the suit, while Second Appeal No. 1473 of 1974 has been preferred by the plaintiff in the suit. Though the suit for dissolution of the partnership firm and rendition of accounts was dismissed by the trial Court in the first instance, the lower appellate Court reversed the conclusion on 6th November, 1962 and passed a preliminary decree for dissolution and rendition of accounts and gave detailed directions as to how the accounts should be rendered. The matter came up in second appeals to this Court and I dismissed the second appeals by my judgment dated 4th March, 1968 in Second Appeal Nos. 1700 of 1962 and 121 of 1963, subject to a slight modification in the decree of the lower Appellate Court. It is thereafter final decree proceedings took place. The matter was dealt with by the learned Subordinate Judge and later by the learned District Judge of Coimbatore (East) at Erode by his judgment, dated 5th March, 1973. Second Appeal No. 619 of 1974 has been preferred against A.S. No. 38 of 1972 which itself was an Appeal preferred by the first defendant in the suit. Second Appeal No. 1473 of 1974 has been preferred by the plaintiff against A.S. No. 84 of 1972 preferred by him before the learned District Judge. The matter lies within a very narrow compass in both these second appeals.

2. In Second Appeal No. 619 of 1974, out of three objections which the appellant had put forward against fixing a liability on him, one that survives in the second appeal is the objection put forward by the first defendant that a sum of Rs. 11,166.66 exclusively belongs to him and it should not be taken into account in taking accounts of the partnership firm and that 1/3rd share should not be given to the plaintiff in that amount. His case was that it was earned by him in his individual capacity as an honorarium and that it should be treated as a separate property with no share to the plaintiff. The learned District Judge has rejected this contention. I am not able to appreciate what honorarium a partner can get from the firm and how he can claim that as something earned by him not in his capacity as a partner but something different. In the absence of any facts throwing any light, it must be held that the amount was earned by the first defendant in his capacity as a partner from the partnership firm and, therefore, under the agreement entered into between the parties, the plaintiff was entitled to a 1/3rd share therein. Consequently, Second Appeal No. 619 of 1974 fails and is dismissed.

3. As far as S. A. No. 1473 of 1974 is concerned, two points are urged before me. One is that the learned District Judge had not granted any relief in the final decree against the third defendant-company in respect of the assets of the second defendant in the custody or hands of the third defendant, though a decree has been granted against the second defendant in favour of the plaintiff. For the purpose of understanding this claim, it is necessary to refer to ground No. 5 in the grounds of appeal in A. S. No. 84 of 1972 filed before the lower Appellate Court. In that ground, the contention of the appellant-plaintiff was as follows:—

> **"The lower Court has erred in thinking that the 3rd defendant is not liable for the suit claim of the appellant. The observations in para. 10 of the judgment of the lower Court, namely, "the decree is silent with regard to the liability of the 3rd defendant. There is no justification for directing 3rd defendant to pay a sum to the plaintiff', is not correct. The lower Court failed to note that at the time of filing of the suit, the 2nd defendant was alive and that the 2nd defendant died during the pendency of the second appeal in the High Court. After the passing of the preliminary decree in the suit, the 3rd defendant company had obtained a transfer of the interest of the deceased 2nd defendant and has been holding the interest of the 2nd defendant and his legal representatives ever**

since the date of the transfer. To the extent of the value of the property thus transferred by the heirs of the 2nd defendant to the 3rd defendant-company, the plaintiff will be entitled to recover his decree amount by tracing the property of the 2nd defendant in the hands of the transferee, namely, the 3rd defendant. The lower Court has failed to appreciate this aspect of the case and has rejected the contention of the plaintiff that he is entitled to recover the amount from the property in the custody of the 3rd defendant which rightly belonged to the 2nd defendant at the time of the filing of the suit and therefore liable to answer the claim of the plaintiff. The decree must be made clear on this aspect in addition to the fact that the 2nd defendant is liable to pay the amount covered under the final decree.............."

4. A perusal of the judgment of the learned District Judge shows that this ground has not been considered at all by him. Consequently, I have no alternative but to send the matter back for consideration of this question.

5. The second point raised that is the appellant-plaintiff is entitled to interest on the amount due to him on taking of accounts from the date of plaint and not from the date of the decree. This point was urged before the Courts below and the learned District Judge rejected this contention following a decision of this Court. However, Mr. R. Gopalaswami Iyengar, the learned counsel for the appellant contends that recently a Bench decision of this Court has held that in such a case the appellant is entitled to interest from the date of plaint itself and not merely from the date of the decree. The judgment relied on by the learned counsel is reported in *Vincent Antony Jabamalai Fernando and others* v. *S.A. Thomas Fernando alias J.A. Thomas Fernando and others*.[1] A perusal of that judgment shows that the Bench of this Court has made a distinction between a suit for rendition of accounts of a dissolved firm and a suit for a decree dissolving the firm and rendition of accounts and has pointed out that the decision of the Privy Council in *Suleman* v. *Haji Abdul Latif*,[2] would apply to a case where the suit was for the dissolution of a going concern and rendition of accounts, and in such a case the interest would be payable from the date of the decree and that in a case where the suit is for rendition of accounts on the basis that the firm stood dissolved even prior to the institution of the suit, the plaintiff would be entitled to interest from the date of plaint itself and to such a case the decision in *Hakim Raj* v. *Gangaram*,[1] would apply.

6 In the present case, the suit was one for dissolution of the partnership and for rendition of accounts and the decree of the lower appellate Court is to the effect that the plaintiff was entitled to have the suit partnership dissolved as from the date of the plaint in the suit and therefore this was not a case for rendition of acconnts of a firm already dissolved, but a suit for dissolution of the firm and rendition of accounts. Consequently, the appellant is entitled to interest only from the date of the decree as held by the learned District Judge and therefore this point taken by the appellant in the second appeal fails.

7. The result is, S.A. No. 1473 of 1974 is allowed in part and the judgment and decree of the learned District Judge in A.S. No. 82 of 1972 is set aside in part and the first appeal is remanded only for the purpose of enabling the District Judge to consider ground No. 5 extracted above and put forth in the memorandum of grounds of appeal before him and the consideration and final determination of the learned District Judge will be confined only to that point and the learned District Judge will not be entitled to consider any other point. The learned District Judge will dispose of the appeal within one month from the date of the receipt of the records from this Court.

8. There will be no order as to costs in either of the second Appeals.

R.S. ——— *Second appeal partly allowed*

1. (1977) 90 L.W. 655: A.I.R. 1978 Mad. 90.
2. (1930) 59 M.L.J. 121; 57 I.A. 245: 32 L.W. 184: A.I.R. 1930 P.C. 185.

1. (1943) 1 M.L.J. 16: 56 L.W. 121: 69 I.A. 172: A.I.R. 1942 P.C. 61.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*V. Sethuraman, J.*

C. Abdul Salam .. *Appellant**

v.

A. A. Jaleel and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 95—Fixation of statutory liability—Accident due to rash and negligent driving of lorry driver—Cleaner of the lorry sustaining grievous injuries—Compensation of Rs. 4,900 awarded by Tribunal as damages against the insurance companies under the Workmen's Compensation Act and Rs. 1,500 as damages under the general law against lorry-owner—Whether liability of insurance company could be restricted only to the sum payable under the Workmen's Compensation Act.

Where the liability of the insurance company is restricted under the contractual terms to the amount due under the Workmen's Compensation Act, then the amount due under that Act alone could be awarded and this could be done even by the Tribunal constituted under the Motor Vehicle's Act and not necessarily by the authority constituted under the Workmen's Compensation Act. [*Para.* 4.]

It is arguable that in a policy issued in accordance with the provisions of the Motor Vehicles Act, the minimum liability is what is provided by the statute and a larger liability can also be agreed to be paid under the contract between the parties. In other words, nothing in section 95 (2) of the Act can be taken as preventing the parties from entering into a contract for payment of a larger amount in case they considered it fit to do so. The freedom of contract is restricted under section 95 of the Act only to see that the liability contemplated by the statute is not avoided by providing for a smaller sum as a liability under the contract of insurance. [*Para.* 5.]

There can be no dispute about the fact that the Tribunal constituted under the Motor Vehicles Act is competent to award the appropriate amount as compensation or damages, even in excess of what has been contemplated by the Workmen's Compensation Act. So long as the insurance policy did not restrict the liability to what is contemplated by the Workmen's. Compensation Act, the insurance company will have to bear the larger liability also *i.e.*, the liability in excess of what is due under the Workmen's Compensation Act. [*Para.* 6]

Cases referred to:—

Venkataraman v. *Abdul Munaf Sahib*, (1971) A.C.J. 77; *General Assurance Society Limited* v. *Jayalakshmi Ammal*, (1975) 1 M.L.J. 148: 88 L.W. 758: (1975) A.C.J. 159: A.I R. 1975 Mad. 198; *Babu Singh* v. *Champa Devi*, (1974) A.C.J. 163.

Appeal against the order of the Motor Accidents Claims Tribunal (District Judge) of Coimbatore, dated the 24th December, 1974, and made in M.C.O.P. No. 74 of 1973.

G.M. Nathan and *P. R. Raishnan*, for Appellant.

S. J. Jayadev, Kurian Arumugam and *Joseph*, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal has been filed by the first respondent in M.C.O.P. No. 74 of 1973 before the Motor Accidents Claims Tribunal, Coimbatore. The petitioner before the Tribunal by name Jaleel was employed as a cleaner in a lorry bearing No. M.D.U. 256 belonging to the appellant. On 29th May, 1972, he was travelling in the lorry with a load of sugarcane from Karur to Manapparai. On account of the alleged rash and negligent driving of the vehicle by the 2nd respondent before the Tribunal, the driver, the vehicle is said to have capsized at Malakoil near Tachanur village. The first respondent's legs got underneath the lorry causing grievous injuries to him. He was in the Coimbatore Medical College 'Hospital as an in-patients from 29th September, 1972, to 21st November, 1972, during which period his left leg was amputated on 4th October, 1972. He claimed to have been undergoing treatment even later, and had also an artificial limb fixed after the wound was completely healed. He claimed Rs. 50,000 as compensation out of which Rs. 40,000 was for loss of earning power and for permanent disability, Rs. 5,000 towards artificial limb and for medical expenses, Rs. 4,000 for pain and suffering and Rs. 1,000 for loss of earning. The owner and the driver admitted that the first respondent herein was employed as a cleaner of the lorry on an income of Rs. 170 per month. They also admitted that as a result of the accident his

*A.A.O. No. 259 of 1976. *22nd September*, 1978.

legs had been amputated. They contended that the vehicle had been insured to cover the risk of the cleaner and, that therefore, they were not liable to pay any compensation. The 2nd and 3rd respondents herein are the insurance companies. They disputed the question of rashness and negligence on the part of the driver. They also contended that they were not liable. The. 3rd respondent insurance company herein contended that the liability arising out of the accident had to be borne only by the 2nd respondent herein and that it was not a necessary party to the action. The quantum of damage was also disputed.

2. The Tribunal held that the accident was due to the rashness and negligence on the part of the driver of the lorry and awarded Rs. 4,900 as damages payable under the Workmen's Compensation Act and Rs. 15,100 as damages under the general law. The damages payable under the Workmen's Compensation Act was decreed as against respondents 2 and 3 herein, the insurance companies, while the damages payable under the general law was decreed as against the appellant the owner of the vehicle. The appellant contends in the present appeal that even as regards the amount due as compensation under the general law, the amount would have to be paid by the insurance companies and not by him Therefore, the only point that requires consideration in the present appeal is, whether the liability of the insurance companies could be restricted, only to the sum payable under the Workmen's Compensation Act.

3. In this connection three decisions were brought to my notice, two of them being the decisions of this Court and one being of the Allahabad High Court. In *Venkataraman* v. *Abdul Munaf Sahib*[1] the cleaner of a lorry died in an accident on account of the negligence of the driver of the lorry. His dependants filed an application for compensation before the Tribunal. The contention urged on behalf of the insurance company was that it was not liable to pay any compensation in respect of an employee of the insured and that even assuming that it was liable to pay compensation its liability had to be restricted to the amount payable under the Workmen's Compensation Act. There was also the plea that the amount due under the Workmen's Compensation Act, had to be pursued only before the authorities contemplated by that Act and not before the Tribunal. It was held by Maharajan, J., that section 95 of the Motor Vehicles Act provided for a statutory duty on the insurance company to indemnify the insured against any liability to Pay compensation to his employees under the Workmen's Compensation Act, that the insurance company could not contend that it was absolved of its liability to pay compensation, merely because the proceedings had been initiated before the Tribunal constituted under the Moter Vehicles Act, and that it was open to the Tribunal appointed under the Motor Vehieles Act to determine the liability under the Workmen's Compensation Act and award the amount so determined against the insurance company. In the course of his judgment, the learned Judge extracted the relevant clause of the contract of insurance between the parties, and pointed out that on the facts of that particular case, the stipulation was that the insurance company undertook to indemnify the insured to the extent necessary to meet the requirements of section 95 of the Motor Vehicles Act only in relation to the liability under the Workmen's Compensation Act. The compensation was then restricted to that amount. In *General Assurance Society Limited* v. *Jayalakshmi Ammal and others*[1] this decision was followed by Paul, J.:

4. The effect of these two decisions is to hold that where the liability of the Insurance Company is restricted under the contractual terms to the amount due under the Workmen's Compensation Act, then the amount due under the Workmen's Compensation Act alone could be awarded and this could be done even by the Tribunal constituted under the Motor Vehicles Act and not necessarily by the authority constituted under the Workmen's Compensation Act.

5. In *Babu Singh* v. *Champa Devi and others*[2], the Allahabad High Court had to deal with a slightly different question, namely whether the maximum fixed under section 95 (2) could only be the liability of the insurance company even though the vehicle may have been insured for a larger amount. In that case, the vehicle had been insured for a sum of Rs. 40,000. The maximum statutory liability under section 95 (2) in respect of goods vehicle was only Rs. 20,000. It was held that the amount due as and by way of statutory liability would alone

1. (1971) A.C.J. 77.

1. (1975) 1 M.L.J 143: 88 L.W. 758: (1975) A.C J 153: A.I.R. 1975 Mad 198.
2. (1974) A.C.J. 163.

have to be paid by the insurance company. The terms of the policy in that case are not available. It is unnecessary to consider whether the construction placed on section 55 (2) of the Act in the Allahabad decision was proper. It is arguable that in a policy issued in accordance with the provisions of the Motor Vehicles the Act, minimum liability is what is provided by the statute and a larger liability can also be agreed to be paid under the contract between the parties. In other words, nothing in section 55 (2) of the Act can be taken as preventing the parties from entering into a contract for payment of a larger amount in case they considered fit to do so. The freedom of contract is restricted under section 95 of the Act only to see that the liability contemplated by the statute is not avoided by providing for a smaller sum as a liability under the contract of insurance.

6. There can be no dispute about the fact that the Tribunal constituted under the Motor Vehicles Act is competent to award the appropriate amount as compensation or damages, even in excess of what has been contemplated by the Workmen's Compensation Act. This follows from the two Madras decisions. So long as the insurance policy did not restrict the liability to what is contemplated by the Workmen's Compensation Act, the insurance company will have to bear the larger liability also *i.e.*, the liability in excess of what is due under the Workmen's Compensation Act. In the present case, there is no dispute about the right of the Tribunal to award Rs. 15,100 as damages. The insurance policies have not been produced in order to enable me to find out whether the amount undertaken to be paid is restricted to the amount due under the Workmen's Compensation Act. The insurance companies must have copies of the insurance policies with them and therefore if they wanted to reduce their liability they could have produced the copies. There is nothing to show that the appellant was called upon to and did not produce the policy. In the absence of their production, it is not possible to restrict their liability only to the sum of Rs. 4,500. The sum of Rs. 15, 100 would also have to be paid by the insurance companies. The appeal is allowed accordingly with costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—G. *Ramanujam, J.*

B. Nathmall Vaid .. *Appellant**

v.

State of Tamil Nadu represented by Collector of Nilgiris Ootacamund and another .. *Respondents**

Wild Birds and Animals Protection Act (*VIII of* 1912), *section* 3; *G/O. Ms' No* 2152, *dated* 21*st February*, 1960. *Death of a tusker elephant in patta land of estate owner—Information given by land-owner to District Forest Officer—Two tusks of the elephant handed over to the Officer by the landowner —Acknowledgment given by Officer to landowner that the tusks would be returned after getting formal approval of the higher authorities - Failure to return the tusks - Suit by estate owner against Government for the value of the tusks—Claim by Government of the property belonging to the Government—Landowner whether entitled to a decree.*

A close reading of the Government Order would clearly Indicate that the ownership of the tusks vested only with the owner of the land in which the elephant was found dead. Perhaps, the tusks will become Government property if the officials of the Forest Department had chased the animal and the animal as a result of the chase entered into the plaintiff's land and died there. But, so long as there was no proof of any chase and the wild animal had voluntarily left the reserve forest and died in the plaintiff's patta land, the Government cannot claim the ownership of the tusks. [*Para.* 6.]

It is clear whatever might be the position in regard to live animals, as regards wild animals which are found dead in a private land the owner of the land is entitled to claim ownership of the dead animal, and the bodies of wild animals which are found on a particular land become the absolute property of the owner of the soil, even if killed by a trespasser, unless the trespasser chased the animal on the land of one person and killed it on the land of another. Admittedly, the animal was found dead in the patta land of the landowner. The dead elephant in question had not been chased or pursued by the forest authorities,

*S.A. No. 1483 of 1975. *2nd November*, 1978.

but it had been shot at by some unknown persons and it voluntarily quit the reserve forest and entered the private land where it died. [*Para*. 12.]

Cases referred to:—

Makath Unni Mayi v. *Malabar Kandapunni Nair*' (1882) I.L.R. 4 Mad. 268; *K. Madhavan* v. *State of Kerala*, A.I.R. 1964 Ker. 287; *Blades* v. *Higgs*, (1865) 11 H.L.C. 621; *Gear* v. *State of Connecticut*, (1896) 161 U.S. 519: 40 Law. Ed. 793.

Appeal against the decree of the District Court, Coimbatore (West) in Appeal Suit No. 98 of 1273, preferred against the decree of the Court of the Subordinate Judge of Nilgiris in Original Suit No. 43 of 1971.

M.A. Rajagopalan and *G. Swaminathan*, for Appellant.

The Additional Government Pleader, for Respondent.

The Court delivered the following

JUDGMENT.—**In this case, an interesting question of law arises on certain undisputed facts. The appellant herein is the owner of Singara Estate situate at Masinagudi village in** Ootacamund taluk. On 16th June, 1969, a tusker elephant was found dead in his patta land bearing S. No. 207 of Masinagudi village which formed part of his estate. On 17th June, 1969, the plaintiff informed the second defendant, of his intention to bury the carcass in his estate. The Forest Officer, Segur and a Veterinary Doctor came to the spot and conducted an autopsy and on the instructions of the Forest Range Officer, the Forester of Segur Section took custody of the two tusks of the dead elephant from the plaintiff after giving an acknowledgment that the tusks would be returned to the plaintiff after getting formal approval of the higher authorities. Since the second defendant did not return the tusks, the plaintiff called upon the Department to return the same. However, the plaintiff was informed by the 2nd defandant that his claim for return of the tusks had been rejected. The plaintiff, therefore, filed a suit O S. No. 43 of 1971 on the file of the Sub-Court, Ootacamund. for the recovery of a sum of Rs. 7,000 being the value of the two tusks.

2. The defendants resisted the suit contending that the elephant was found to be moving in the forest with difficulty, that the Guards of the Forest Department were keeping watch over the elephant since fifteen days prior to its death, that the tusks are the property of the Government and that, therefore, the plaintiff is not entitled to ask for the return of the tusks.

3. The trial Court after duly considering the evidence found that the tusker found dead in the plaintiff's patta land was a wild elephant, that the tusker had been shot at, several times by some unknown persons during a period of six months prior to its death, that it was moving about in the reserve forest in the wounded condition, that the officials of the Forest Department kept a watch over its movements and that subsequently they found it lying dead in the patta land of the plaintiff. On these facts which are more or less admitted, the trial Court went into the question as to who will be entitled to the tusks in question as between the plaintiff on the one hand and the Government on the other. The Government placed reliance on section 3 of the Wild Birds and Animals Protection Act and also G.O. Ms. No. 2152, dated 21st February, 1960 in support of its claim for the ownership of the tusks in question. The trial Court, held that neither the provisions of the said Act nor the Government Order in question will apply to the facts of this case and that under the general law, the tusker, which is a wild animal, having been found dead in the plaintiff's patta land, he is entitled to the ownership of the tusks. According to the trial Court G.O. Ms. No. 2152, dated 21st June, 1960 which treated a ten-mile belt around Mudumalai Wild Life Sanctuary as a closed time for the whole year and which made it unlawful to capture, sell, buy or possess any bird or animal or the flesh thereof which had not been captured or killed before the commencement of such close time cannot apply to the case in question. It also held that Wild Birds and Animals Protection Act is applicable only in respect of animals and birds which are specified in the schedule and not to an elephant which is not an animal specified in the schedule to that Act.

4. The matter was taken up in appeal to the District Court. The District Court after agreeing with the facts found by the trial Court held that in view of another G.O. Ms. No. 3440, dated 15th November, 1954 as the elephant had been pursued by the Departmental the two tusks vest in the Government. In this view, it allowed the appeal and dismissed the plaintiff's suit.

5. In this second appeal, the decision of the lower appellate Court that the property in the dead elephant vested with the Government has been challenged. As the facts set out above are not in dispute, the only question to be considered here is as to who will be entitled to its tusks on the above admitted facts.

6. As already stated in the appellate Court the respondents have relied on G.O. Ms. No. 3440, dated 15th November, 1954 in support of its conclusion that the property in the dead elephant belonged to the Government. The said Government Order says:

> "A man has a property *ratione loci* in animals which are *ferrae naturae* on his land but this property ceases when they quit or are hunted on the land. The right of the owner of a forest contiuues after they are hunted out of the forest but not after they voluntarily quit it (page 205 of Col. II of the English and Empire Digest). From the principles set out above, it will be seen that a wild elephant escaping from a Reserve Forest without being pursued by the Departmental Officers will cease to be the property of the Government and if such an elephant is shot dead by a private party in another man's land, the property in that animal will be that of the owner of the land. As the ownership of the tusks of the wild elephants shot on private lands is thus well settled, the Government do not agree to amend section 6 of the Madras Wild Elephants Preservation Act, 1973 as suggested by Chief Conservator of Forests. They therefore direct that the proposals of the Chief Conservator of Forests be dropped."

As per the said Government Order a wild elephant escaping from a Reserve Forest without being pursued by the Departmental Officers will cease to be property of the Government, and if such an elephant is shot at by a private party in another man's land the property in that animal will be that of the owner of the land. The lower appellate Court has taken the view that as the Departmental Officers had kept a close watch over the movements of the animal for about 15 days prior to its death, the Government can claim ownership of the tusks. I do not see how the lower appellate Court has taken the view that the dead elephant in this case, had earlier been pursued by the Departmental Officers. Admittedly, the elephant was a wild animal and it was moving about after it has been shot by some unknown persons. It is not the case of the Department that the officers of the Department shot the elephant and the death was as a result of the same. The evidence on the side of the Department is that the elephant was found moving in a wounded condition and that was being watched under the instructions of the higher Authorities. The evidence does not indicate that the animal was pursued by the Forest Officers at any time. The mere keeping watch over an animal which is moving about in the Forest cannot amount to actual pursuit of the animal by the Forest Officers. Therefore the lower appellate Court is in error in the application of the said Government Order. As a matter of fact, a close reading of the Government Order would clearly indicate that the ownership of the tusks vested only with the owner of the land in which it was found dead. Perhaps, the tusks will become the Government property if the Officials of the Forest Department had chased the animal and the animal as a result of the chase entered into the plaintiff's land and died there. But, so long as there is no proof of any chase and the wild animal had voluntarily left the reserve forest and died in the plaintiff's patta land, I do not see how the Government can claim ownership of the tusks in this case. The position of wild animals of *ferae naturae* as well as the rights of the owner of the property in respect of such wild animals have been discussed in various text books as well as in certain judicial decisions. In *Makath Unni Mayi* v. *Malabar Kandapunni Nair*[1] the owner dug a pit in his land for the purpose of capturing wild elephants, and an elephant fell into that trap but another person took it out of the pit and converted it into his own use. The question arose as to whom the elephant belonged. It was held that the plaintiff who dug the pit in his own land in which the elephant fell was entitled to the elephant. In *K. Madhavan* v. *State of Kerala*[2] it has been held that though there can be no property existing in an owner of the land in animals *ferae naturae* so long as they remain in the state of nature, when such animals are killed or reclaimed by the owner of the land they become his property, absolutely when they are killed and in a qualified manner when they are reclaimed.

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1. (1882) I.L.R. 4 Mad. 268
2. A.I.R. 1964 Ker. 287.

7. In Halsbury's Laws of England, Third Edition, Volume I at page 656, in paragraph 1252, the law is stated thus:

> "There is no absolute property in wild animals while living, and they are not goods or chattels. There may, however, be what is known as a qualified property in them, either: (1) *ratione impotentiae at loci*, (2) *ratione soli and ratione privilegii*, or (3) *per industriam*. This qualified property is deafeasible, for, if the animal has not *animus revertendi* but resumes its wildness and is at large again and not under pursuit it is free and may be taken by another person. Thus the special right of property, called qualified property if conferred *ratione impotentiae at loci*, *ratione soli* or *ratione privilegii* is in substance an exclusive right to reduce the wild animal into possession but if acquired *per industriam* it is an exclusive right to the possession of the wild animal, which, in the case of a living animal, will continue while it has *animus revertendi*".

In paragraph 1255 at page 657 it is further pointed out as follows:—

> "The owner of land, who has retained the exclusive right to hurt, take, and kill animals *ferrae naturae* on his own land, has a qualified property *ratione soli* in them for the time being while they are there. But, if such an owner grants to another the right to hunt, take, and kill animals *ferrae naturae* on his land, the grantee has a qualified property *ratione privilegii*, as in the case of a free warren on another man's soil, or a licence or grant of shooting or sporting rights. Such a grant is an incorporeal hereditament and an interest in reality and amounts to a licence or a *profit a prendre* which can only be validly granted or demised by dead."

At page 658 in paragraph 1256 under the Head: 'PROPERTY IN WILD ANIMALS WHEN KILLED', it is stated "although there is only a qualified property in animals *ferae naturae* while they are alive, yet if they are killed, or die, there is an absolute property in the dead animal, which vests in the owner or occupier of the land..........".

In Halsbury's Laws of England, III Edition, Volume 18 at page 128, in paragraph 262, under the caption 'PROPERTY IN AND RIGHTS OVER GAMES', it has been said:

> "The law of England does not admit a right of absolute property in game, which belongs to a class of animals *ferae naturae*, but it does intervene to protect private interests in game by limiting the right over it to certain classes of persons These classes acquire their rights in one or other of two ways:—(1) *ratione privilegii*, that is, by special grant from the Crown: (2) *ratione soli* that is, by virtue of ownership or occupation of the soil........".

> "......the rights of the occupier of the soil have been admitted and extended until at the present day the right to kill and take game is recognised as being incidental to the occupation of land, and the property in such animals is therefore not absolute or actual, but qualified and potential."

8. Again at page 129 in paragraph 263, it is stated:

> "...the property which, when the game is alive and free, is only qualified or potential, becomes absolute when the game is killed or otherwise reduced into possession. The game, when dead or captured, belongs to the owner of the land where it is killed, and he can claim possession of it, and, if necessary, bring an action for trover."

In Black's Law Distionary, IV Edition, at page 1383 under the heading "QUALIFIED PROPERTY" it is stated as follows:—

> "Property in chattels which is not in its nature permanent, but may at some time subsist and not at other times, such for example, as the property a man may have in wild animals which he has caught and keeps, and which are his only so long as he retains possession of them."

9. In the Penal Law of India by Hari Singh Gour, VII Edition, Volume III, at page 1883, it is stated that in the case of animals *ferae naturae* the property in them can only be acquired if they are dead, tamed or confined, otherwise they are presumed to be in their original state.

10. The House of Lords, in *Blades* v. *Higgs*[1] had occasion to consider the legal position when a stsanger without the permission of the owner of the property kills an animal on the

1. (1865) 11 H.L.C. 621.

latter's land and carries it away. The Lord Chancellor had observed in that case that "property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *ferae naturae* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the land."

"....By the Civil Law, the person who took or reduced into possession any animal *ferae naturae*, although he might be a trespasser in so doing, acquired the property in it. This appears clearly from the passage in the Institutes cited in the argument. If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon His Lordship's land."

The position is again stated by the learned Lord as follows:—

"With respect to wild and unreclaimed animals, therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed, or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed.

Therefore, it will be seen that though there can be no property existing in an owner of a land in animals *ferae naturae*, so long as they remain in the state of nature, when such animals are killed or reclaimed by the owner of the land they become his property, absolutely when they are killed, and in a qualified manner when they are reclaimed."

11. In the decision of the American Supreme Court in *Gear* v. *State of Connecticut*[1] a slightly different view has been expressed. In that decision the attack was against a particular piece of legislation prohibiting the killing of certain birds during a particular season, for the purpose of conveying the same beyond the limit of the State. There was also a prohibition regarding the transport of such birds killed within the State. These provisions were attacked on the ground that they violate inter-State Commerce clause of the Constitution of the United States.

The American Supreme Court expressed the following view:

"From the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the control of the law giving power.

We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common."

In Corpus Juris Secundum, Vol. III, page 1087, it is stated "that the wild animals at large within its borders are owned by the State in its sovereign as distinguished from its proprietory capacity, and neither such animals nor any parts thereof are subject to private ownership except in so far as the State may choose to make them so. Such animals become the subject of private ownership only so far as the people through their legislature may elect to make them so....."

In American Jurisprudence, Vol. II, at page 694, the following passage occurs:

"In the United States the ownership of wild animals and fish not reduced to actual possession by private persons is in the people of the State in their collective sovereign capacity, or in the State as representing all the people."

Thus, the legal position in the United States of America appears to be somewhat different from the law in India and in England.

12. From the above discussions, it is clear whatever might be the position in regard to live animals, as regards wild animals which are found dead in a private land the owner of the land is entitled to claim ownership of dead animals, and that the bodies of wild animals which are found on a particular land became the absolute property of the owner of the soil even if killed by a trespasser, unless the trespasser chased the animal on the land of one person and killed it on the land of another. Admittedly, the animal was found dead in the patta land of the appellant. The dead elephant in question had not been chased or pursued by the Forest authorities, but it had been shot at by some unknown person and it voluntarily quit the reserve forest and entered the private land where it died: In this view, the order of

1. (1896) 161 US. 519: 40 Law Ed. 793.

the lower appellate Court cannot be sustained.

13. The result is that the second appeal is allowed with costs and the suit O.S. No. 43 of 1971 on the file of the Sub-Court, Ootacamund, will stand decreed with costs as prayed for.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*C.J.R. Paul, J.*

State by Public Prosecutor .. *Petitioner**

v.

K.R. Krishnamurthy ... *Respondent.*

Prevention of Corruption Act (II of 1947), Sections 5 (1) (c) and 5 (2)—Offence under section 5 (1) (c) read with section 5 (2)—Accused pleading guilty—Sentenced to imprisonment till rising of Court—Appeal by State against lenient punishment—Accused sentenced to fine of Rs. 50 in addition to the sentence already undergone.

The accused-respondent committed offences under section 5 (1) (*c*) read with section 5 (2) of the Prevention of Corruption Act, pleaded guilty before the trial Court and was sentenced to imprisonment till the rising of the Court. The State filed an appeal for enhancement of the sentence awarded.

Held: Imposition of such lenient sentences for offences like these, did not serve any purpose. The sentence loses its efficaciousness as a deterrent sentence if it is too lenient. The High Court sentenced him to pay a fine of Rs. 50 in each of these cases, in default to undergo simple imprisonment for two weeks, in addition to the sentence of imprisonment till the rising of the Court imposed by the trial Court. [*Para.* 3.]

Case referred to:—

B.C. Goswami v. *Delhi Administration*, (1973) 1 S.C.W.R. 918: (1973) S.C.C. (Crl.) 796: (1974) 3 S.C.C. 85: A.I.R. 1973 S.C. 1457.

Appeals for enhancement of the sentence imposed on the respondent-accused in all the appeals herein by the III Additional Special Judge, Madras dated 10th March, 1975 in C.C. Nos. 3 to 5 of 1975.

*Crl.A.Nos. 443 to 445 of 1975. 1st *March*, 1978.

P. Rajamanickam, for State.

V. Thiruvenkatachari, for Respondent.

The Court made the following

ORDER.—These three appeals are by the State represented by the learned Public Prosecutor for enhancement of the sentence meted out to the accused who was convicted by the learned III Additional Special Judge, Madras Division, in three cases, of offences under section 5 (1) (*c*) read with section section 5 (2) of the Prevention of Corruption Act, and sentenced to imprisonment till the rising of the Court for those offences. It was on his own admission and plea that the accused was convicted as aforesaid by the learned Judge, who has accepted his plea of guilt.

2. The learned Public Prosecutor contends that considering the circumstances of the case the sentences meted out to the accused are extremely lenient and are actually not warranted. I am in entire agreement with the learned Public Prosecutor. For an offence under section 5 (1) (*c*) read with section 2 (2) of the Prevention of Corruption Act, the minimum sentence prescribed is rigorous imprisonment for one year. The proviso to that section says that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year. In this case the reasons given by the learned Special Judge for the very lenient sentence which he meted out to the accused are that the accused has paid back to the bank the entire sum of Rs. 1,50,683 misappropriated by him even long before the charge-sheet was filed and had readily admitted the offences and deeply lamented for the same; and further the accused was aged about 41 years and would also lose his job. But then, considering the circumstances of the case, I do not think that these reasons would validly support such a lenient punishment as has been meted out to the accused.

3. The Supreme Court has in *B.C. Goswami* v. *Delhi Administration*[1], observed as follows:—

"Now the question of sentence is always a difficult question, requiring as it does, proper

1. (1973) 1 S.C.W.R. 918: 1973 S.C.C. (Crl.) 796: (1974) 3 S.C.C. 85: A.I.R. 1973 S.C. 1457.

adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment, thus play their due part in judicial thinking while determining this question. In modern civilised societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentences both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal".

Imposition of such lenient sentences as those for offences like these, does not serve any purpose. The sentence loses its efficaciousness as a deterrent sentence if it is too lenient. Therefore I have to deprecate in this case the very lenient sentence meted out to the accused and I would have had no hesitation in enhancing the sentence but for the fact that from the year 1974 the accused has been undergoing the agony of these criminal proceedings. Considering the long lapse of time that has occurred between the conviction of the accused and this date, nearly four years, I feel that while deprecating the lenient punishment meted out to the accused by the learned Special, Judge and while stating in unequivocal terms that this Court in such cases will not hesitate to interfere, it is not necessary to send the accused to jail by imposing on him any substantive term of imprisonment. But in vindication of the principles which I have mentioned above, I feel that the accused should be sentenced to pay fine in addition to the sentence of imprisonment till the raising of the Court imposed by the trial Court. I sentence him to pay a fine of Rs. 50 in each of these cases, in default to undergo simple imprisonment for two weeks in addition to the sentence of imprisonment till the rising of the Court imposed by the trial Court. Time for payment one month.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

Jaihind Roadways, a proprietory concern, represented by Proprietor Mr. Vaidya, carrying on business with Head Office at Bombay and Branch Office at No. 19, Vanier Street, Madras-1.

.. *Petitioner (Defendant)**

v.

1. Chellarama Garments (P) Ltd. a Private Ltd., Co., having its main office at 181/182, Mount Road, Madras-2 represented by its power of Attorney Agent, New India Assurance Company Ltd.

2. New India Assurance Company Ltd., a public Ltd. Company, having its area office at 4/5, Ist Line Beach, Madras-1.

... *Respondents (Plaintiffs).*

(A) *Civil Procedure Code* (*V of* 1908) *section* 20—*Suit by purchaser of goods against carrier for damages—Allegation of short delivery—Defence as to jurisdiction being exclusively vested in another Court at the place of the Head office of the carrier under the terms of the contract of affreightment—Purchaser not a party to the contract of affreightment—Not bound by it.*

(B) *Sale of Goods Act* (*III of* 1930), *sections* 37 *and* 39—*Agency—Principle—Applicability in case of torts.*

It is fundamental that a person, who is not a party to a contract, is neither bound by it nor is he obliged under it. The Indian Contract Act defines a contract not in so many terms, but the chapter dealing with essential ingredients of a contract, such as communication, acceptance etc. makes it clear as to what a contract could be. All agreements of contract would be valid, unless they are tainted by want of free consent etc., or for want of lawful consideration or are hit by public policy. All essential ingredients inbuilt in the concept of a contract imply that the relative and reciprocal obligations arising thereunder would bind only the parties to it and not third parties. The plaintiff in the instant case, not being a party to the contract of affreightment would not be bound by the clause relied upon by the objector as to jurisdiction.

*C.R.P. No. 2423 of 1977 24th *October*, 1978.

It would only enable the consignor (at Bombay) to be bound by it. The interdict if at all, is against the consignor. But under clause 17 of the G.C. note the aggrieved party is obliged to file a suit in one or the other of the Courts in Bombay city alone in respect of all claims and matters arising under the contract of affreightment. The plaintiff being outside the pale of obligation cannot be compelled to perform it. [*Para.* 4.]

It would be a travesty to interpret section 39 of the Sale of Goods Act to mean that even in cases when the plaintiff lays his action in tort or negligence of the carrier he would be an agent of the seller within the meaning of the section which again would necessarily compel him to file a suit for damages as against the carrier for such negligence only at Bombay.

It was never and could not be the intention of the legislature that such contracts made by the consignor with the carrier containing such penal clauses without the concurrence of the consignee would also bind the consignee notwithstanding the fact that he is outside the pale of such a contract and notwithstanding also the fact that the conditions therein are so onerous and unconscionable as to render the very relief which a consignee could obtain under the general law merely illusory. [*Para.* 5.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of Court of Small Causes (II Judge), Madras dated 18th Febuary, 1977, and made in M.P. No. 220 of 1977 in S.C. No. 2622 of 1976.

S.C. Shah, for Petitioner.

Kurian, *Arumugam* and *Joseph*, for Respondents.

The Court made the following

ORDER.—A preliminary objection was raised by the petitioner-defendant on the jurisdiction of the Small Cause Court to try the action in question. The plaintiff filed a suit for the recovery of a sum of Rs. 1,190 against the petitioner, which was a common carrier basing his cause of action on a tort. The claim of the plaintiff was that goods which were entrusted by his seller at Bombay for carriage to Madras and delivery to the plaintiff were not delivered by the carrier intact and there was a shortage in the course of such delivery and evaluating the damage based on such alleged tort committed by the carrier on account of the negligence on the part of the carrier while discharging his obligations under the contract of affreightment, the plaintiff quantified the damage suffered by him at Rs. 1,026 and sought for interest thereon at six per cent per annum. The main contention, amongst others, of the carrier was that under the contract of affreightment, which was obviously as between the carrier-petitioner and the seller, the Courts at Bombay had jurisdiction to decide in respect of all claims and matters arising under the consignment of the goods entrusted for transport. Basing on this clause, which is Clause 17 of what is popularly known as G.C. Note, the carrier-petitioner, as the only defendant in the action, raised a preliminary objection as to the jurisdiction of the Small Cause Court, Madras to try the suit. In the counter affidavit, the plaintiff stated that he was not a party to the contract of affreightment and that as he was suing mainly on the tort alleged to have been committed by the carrier when he carried the goods, the Small Cause Court had the requisite jurisdiction to try the suit.

2. The Court below rightly held that as the plaintiff was not a party to the contract of affreightment, he was not obliged by the terms of the G.C. Note and that as he was claiming damages as against the carrier, not on any contract *inter se* but on the basis of an alleged tort, which, as I said, would include the negligence on the part of the carrier, the Madras Court had the jurisdiction to entertain the suit. In those circumstances, the learned Small Cause Court Judge rejected the preliminary objection and passed the order which is challenged in this civil revision petition.

3. Learned counsel for the petitioner raised two contentions. The first one is that under section 37 of the Indian Sale of Goods Act, as every buyer is deemed to be the agent of the seller, once the goods are sent by carriage or otherwise by the seller as required under the contract, then the consignee, as agent of the consignor, has bound himself by all the obligations with which the consignor is bound, and in the context, Clause 17 of the G.C. note would also apply to the consignee and therefore, the suit, as filed by the plaintiff in the capacity as consignee was not maintainable, as there is a specific interdict in the clause as already excerpted that the Bombay Court alone had the requisite jurisdiction to decide disputes between the consignor and the carrier.

The second contention of the learned counsel for the petitioner is that the suit filed by the consignee in the Madras Court is not maintainable as against the carrier not only because section 37 of the Sale of Goods Act prevents him from doing it but also because the plaintiff himself has referred to the contract in the pleadings, which contract would obviously mean the contract entered into between the consignor and the carrier and, therefore, the preliminary objection as to jurisdiction has to be upheld.

4. It is fundamental that a person who is not a party to a contract, is neither bound by it nor is he obliged under it. The Indian Contract Act defines a contract not in so many terms, but the chapter dealing with essential ingredients of a contract, such as communication. acceptance, etc., makes it clear as to what a contract could be. All agreements of contracts would be valid, unless they are tainted by allegation of free consent etc., or for want of lawful consideration or is hit by public policy. All these essential ingredients inbuilt in the concept of a contract imply that the relative and reciprocal obligations arising thereunder would bind only the parties to it and not third parties. The plaintiff is not a party to the contract of affreightment. This is not in dispute. The clause relied upon by the objector as to jurisdiction would only enable the consignor at Bombay to be bound by it. It is an interdict if at all as against the consignor. But under clause 17 of the G. C. note the aggrieved party is obliged to file a suit in one or the other of the Courts in Bombay city alone in respect of all claims and matters arising under the contract of affreightment. This would not, for the reason that the plaintiff was not a party to it and also on the general principle that in equity a person who is outside the pale or an obligation cannot be thrust or compelled to perform it, unless law itself compels him to do it. No law which is so mandatory and compulsive has been brought to my notice which would compel the plaintiff in the present suit to go to Bombay to recover a paltry sum of Rs. 1,000 and odd against a carrier which has a branch office in the City of Madras. That the carrier is carrying on business in the City of Madras is also not in dispute. For all these reasons, I am unable to accept that the plaintiff is in any way bound by the obligations which may slope from the contract as between the seller and the carrier as above.

5. The second point is whether section 39 of the Sale of Goods Act would in any way be a bar for the institution of the present action at Madras. There is no proof that the seller was authorised or required to send the goods to the buyer through the defendant-petitioner and above all subject to a clause like the one under consideration which compelled the consignee to go to Bombay even in matters where negligence on the part of the carrier is involved and alleged. This would be a travesty to interpret section 39 of the Sale of Goods Act to mean that even in cases where the plaintiff lays his action on tort or negligence of the carrier, he would be deemed to be an agent of the seller within the meaning of section 39 of the Sale of Goods Act and which again would necessarily compel him to file a suit for damages as against the carrier for such negligence only in a Court of Bombay No doubt, section 39, whilst speaking about the delivery to the carrier and the scope and content of such delivery, would say that a delivery to a carrier, when the seller is authorised or required to send the goods to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer. That would not mean that all contracts made, however penal and however onerous that may, be, by the seller with the carrier has to be accepted by the consignee on the mere fictional agency created under section 39 of the Act. Here again, I am strongly of the view that it was never and it could not have been the intention of the Legislature that such contracts made by the consignor with the carrier containing such penal clauses without the concurrence of the consignee would also bind the consignee notwithstanding the fact that he is outside the pale of such a contract and notwithstanding also the fact that the conditions therein are so onerous and unconscionable as to render the very relief which a consignee could obtain under the general law merely illusory. I am, therefore, unable to agree with the second contention as well. The lower Court was right in having rejected the objection as to jurisdiction. The petition is dismissed with costs.

R.S. —— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao CJ., and S. Ratnavelpandian, J.*

B.N. Ananthachary and another .. *Appellants**

v.

Mohan Ram and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 40, rule 1—Receiver—Appointment of—Suit with the only prayer for appointment of a receiver, if maintainable.

A person executed a settlement deed in respect of a property in favour of sixteen settlees and provided therein for the sale of the property and distribution of the sale proceeds in accordance with the directions contained therein. The settlor died on 4th December, 1972. The plaintiff who was one of the settlees filed the suit for appointment of a Receiver over the suit property (the subject of the settlement deed), to sell the same and apportion the sale proceeds as provided in the settlement deed. Defendants 1 and 2 raised the objection that there could not be a suit for the bare appointment of a receiver without that relief being ancillary or incidental to the main relief in a civil action. The suit was decided on merits and decreed. Defendants 1 and 2 filed an appeal and raised the preliminary objection that there could not be a suit for the bare appointment of a Receiver.

Held, that a suit for the bare appointment of a Receiver was a misconceived one and, therefore, not maintainable in law. [*Para.* 10.]

Cases referred to.—

Karuppanna Thevar v. *Angammal*, (1926) 51 M.L.J. 67: 23 L.W. 581: A.I.R. 1926 Mad. 678; *K.P. Pallivasal* v. *K.A.S. Arumugham*, (1975) 2 M.L.J. 454: 88 L.W. 584: A.I.R. 1976 Mad. 45; *Ramanatha* v. *Somasundaram*, (1958) 2 M.L.J. 94: 71 L.W. 339: A.I.R. 1958 Mad. 413.

P. Ananthakrishnan Nair, for Appellants.

K.S.V. Sadasivam, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ. — Defendants 1 and 2 in O.S. No. 626 of 1972 on the file of the Subordinate Judge, Madurai, are the appellants. The suit property was the absolute property of one Balu G. Perumal Iyer. According to the plaintiff, he executed a deed of settlement Exhibit A-1 dated 27th March, 1969 *inter alia* in favour of himself, the defendants and 2 others and divested himself, of his title, interest and right in the suit property. There were several recitals in the settlement deed, the main provision of which was that the property has to be sold by all the settlees and out of the sale proceeds, a sum of Rs. 4,000 must be set apart for two religious charities and the discharge of a debt due to one Ramaseshan & Company and that the balance of the sale proceeds were to be equally divided as between the 16 settlees. Perumal Iyer died on 4th December, 1972. The case of the plaintiff is that the defendants did not co-operate with him in carrying out the stipulations in the settlement deed. He, therefore, came to Court with only one prayer, namely the appointment of a Receiver over the suit property, to sell the same and apportion the sale proceeds as between the settlees as provided for in Exhibit A-1. Admittedly, defendants 1 and 2 are in possession of the suit property. Their case is that Perumal Iyer was compelled by the relations on the side of his wife to execute the settlement deed Exhibit A-1 and that the deed is not real and is inoperative in the eye of law. They would also claim that Perumal Iyer did not divest himself of his title in the suit properties; nor did he surrender the same in favour of the donees. On the other hand, their case is that Perumal Iyer executed a registered Will on 30th July, 1972, bequeathing the suit property in their favour and that they are alone entitled to the same. They would claim that they are the legal heirs of Perumal Iyer. They have also set forth in the written statement that they incurred various expenses connected with the funeral of Perumal Iyer and in the above circumstances, they resisted the suit.

2. The case of defendants 3 to 5 was that they are also the legal heirs of Perumal Iyer and questioned the settlement deed. Defendants 6 to 9 remained *ex parte*. Defendants 10 to 13 joined with the plaintiff.

3. On the above pleadings the following issues were framed. [Issues omitted......Ed]. Though the defendants' case in the written statement was that no Receiver could be appointed, yet no specific issue was framed by the trial Court on that important question. But, the above issues framed by him were

*A.A.O. No. 193 of 1975 *10th, August,* 1978.

on merits which he decided in favour of the plaintiff and against defendants 1 and 2. Hence, the appeal by them.

4. The preliminary objection taken by the appellants is that the suit for bare appointment of a Receiver without that relief being ancillary or incidental to the main relief in a civil action is unknown to law and is not maintainable and therefore, on that ground alone, the judgment of the Court below which appointed a Receiver in the above circumstances has to be set aside.

5. We may at once state that though no issue was framed on this material question which arose for consideration, the learned Judge thought such a bare suit would lie. The question argued before us is whether such a suit with the only relief for the appointment of a Receiver over the suit property lies under the provisions of the civil law and under the Civil Procedure Code. The learned Judge thought that the decision reported in *Karuppanna Thevar* v. *Angammal*[1] was a useful guide in coming to the conclusion that a suit for a bare appointment of a Receiver would lie. We shall presently consider this decision.

6. The contention of the learned counsel for the appellants is that such a suit for the appointment of a Receiver is not maintainable without there being a primary suit in which a primary relief is asked for and, therefore he prays that without noticing the merits which were gone into by trial Court, the resultant conclusion of the learned Judge has to be set aside.

7. We are of the view that if we come to the conclusion that a bare suit for the appointment of a Receiver is not maintainable in the eye of law, then it is unnecessary for us to go into the merits. It would have been necessary for us to go into this matter in a little detail but for the decision rendered by us in *K.P. Pallivasal* v. *K.A.S. Arumugham*[2] which squarely governs the situation. Therein, the question arose whether a suit for receivership is maintainable. After considering the purport and content of Order 40, rule 1, Civil Procedure Code and also S. 94, Civil Procedure Code we came to the conclusion that interim relief

1. 23 L.W. 581: (1926) 51 M.L.J. 67: A.I.R. 1926 Mad 678.

2. 88 L.W. 584: (1975) 2 M.L.J. 454: A.I.R. 1976 Mad 45.

can be granted only in aid of and as auxiliary to the main relief and that the prayer for appointment of a Receiver being invariably an interim or an incidental relief that is asked for in the course of litigations, that cannot be granted without there being a suit for any other main relief which could be asked for in law. On a perusal of the judicial precedent noticed by us, in *K.P. Pallivasal* v. *K.A.S. Arumugham*[1] we expressed the view that in order to wrest possession from a party in possession of the suit property, extreme caution must be exercised by Civil Courts, and we have added that a bare suit for the appointment of a Receiver is not maintainable unless such a relief is asked for as an aid to or auxiliary to any other main relief that could be sought by a litigant in the course of litigation.

8. Reliance was placed upon the decision in *Karuppanna Thevar* v. *Angammal*[2] by the learned counsel for respondents. We are unable to see how the said decision is apposite for our purpose. That was a suit in which a reversioner sought for the main relief of declaration of invalidity of an alienation made by the widow and incidentally he asked for the appointment of a Receiver on the ground that the widow was still committing acts of waste. It was in those circumstances the question was considered by Venkatasubba Rao, J., who held such an application was maintainable. He was considering the question whether the court-fee paid in that particular case was right and in those circumstances expressed the opinion that the relief for the appointment of a Receiver was not consequential upon the relief sought as to the alienation within the meaning of S. 7 (4) (*c*) of the then Court-fees Act and said that Clause (*c*) thereof had, therefore no application to the case. He assessed the court-fee in that case. This decision cannot help the respondents because the facts disclosed that there was a suit in which the main relief for setting aside an alienation was there and the request for the appointment of Receiver was auxiliary thereto.

9. Another decision cited before is that reported in *Ramanatha* v. *Somasundaram*[3]. Therein, Panchapakesa Ayyar, J, while characterising the suit itself as an extraordinary case and commenting upon the valuation made therein

1. (1975) 2 M.L.J. 454: 88 L.W. 584: A.I.R. 1976 Mad. 45.

2. (1926) 51 M.L.J. 67: 23 L.W. 581: A.I.R. 1926 Mad. 678.

3. (1958) 2 M.L.J. 94: 71 L.W. 339. A.I.R. 1958 Mad. 413.

as an extraordinary method of valuation adopted the valuation of the plaintiff therein in the peculiar circumstances of that case. The pleadings in that case are not fully before us. The question whether an independent and a bare suit for the appointment of a Receiver could be filed in a civil Court was not considered squarely by the learned Judge. If the learned Judge intended that such a suit would lie, we respectfully disagree with him. But it is unnecessary to express any further views of ours on the said decision as the full pleadings are not before us and the question which has arisen before us did not arise in that state before the learned Judge.

10. Having regard to the Division Bench decision cited already, we are of the view that a suit for appointment of a Receiver is a misconceived one, and, therefore, not maintainable in law. The lower Court ought to have dismissed the suit on that ground, but it considered the merits as well. We expressed our opinion earlier that we are not inclined to go into the merits as at the threshold the suit ought to have been dismissed. We do not therefore, express our dissent or assent to the findings of fact rendered by the learned Judge. It would not, therefore, constitute *res judicata* as between the parties in any future litigation in which they may indulge. With these observations and as the suit itself cannot be maintained, the judgment and decree of the Court below are set aside and the appeal is allowed.

11. The parties at are liberty to take such action as is available to them in law notwithstanding the institution and dismissal of the above suit. There will be no order as to costs.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and G' Ramanujam, J.*

Marimuthu Gounder .. *Appellant**

v.

Ramaswamy Gounder and others .. *Respondents.*

Contract Act (*IX of* 1872), *section* 73—*Agreement of sale—Advance of Rs.* 10,000 *paid for purchase of property—Property not purchased—Suit for refund of amount — Defendants claiming forfeiture of advance alleging breach of contract by plaintiff—Defendants' claim of the amount being earnest money not accepted—Forfeiture not justified in the absence of proof of damage.*

The plaintiff entered into an agreement of sale with the defendants under Ex. B-2. A sum of Rs. 10,000 was paid as advance to the defendants by the plaintiff. The plaintiff sued for refund of the advance on the ground that the defendants committed breach of contract. The defendants claimed that the breach was committed by the plaintiff and that the sum of Rs. 10,000 was forfeitable. The defendants also raised the plea that the only remedy of the plaintiff was a suit for specific performance and not for return of the advance. The trial Court found that the plaintiff committed breach and also held that the plaintiff could only ask for specific performance and not for refund of the advance. The suit was dismissed. The plaintiff filed an appeal. The learned Judge of the High Court on appeal held that it was the plaintiff who committed default and that however since the defendants had not proved any loss or damage to them, the plaintiff would be entitled to the return of the sum of Rs. 10,000 with interest as claimed. The unsuccessful 2nd defendant filed a Letters Patent Appeal. The 2nd defendant claimed that the sum was earnest money and could be forfeited without proof of damage.

Held: It is reasonable to characterise the amount concerned as advance since it bore a very great proportion to the totality of consideration as well. Generally, earnest money forms a small proportion or ratio to the consideration to be passed by one to the other under a contract of sale.

L. P. A. No. 73 of 1978. 11*th September*, 1978.

Having regard to the fact that the amount of Rs. 10,000 was paid, treated and nomenclatured as advance under the agreement of sale the Court could not agree with the appellant that the amount paid should be treated automatically as eanest money. Again in the absence of pleading that the defendants had suffered damage to the tune of Rs. 10,000, the plea that the entire amount paid by the plaintiff could not be demanded and the defendants were not under an obligation to refund it was an extreme contention. Proof of actual damage was a *sine quo non* to seek damages. In the absence of any proof or, even an allegation in the pleading of such damage, it appeared that the conclusion of the single Judge of the High Court was right. [*Para.* 2.]

Cases referred to:—

Ramaswamy Gounder v. *Kuppuswami Gounder*, (1978) 2 M.L.J. 313: 91 L.W. 632; *Fateh Chand* v. *Balakrishna Das,* (1964) 1 An W.R. (S.C.) 60: (1964) 1 M.L.J. (S.C.) 60: (1964) 1 S.C.J. 187: (1964) 1 S.C.R. 515: A.I.R. 1963 S.C. 1405; *Natesa Aiyar* v. *Appavoo Padayachi*; (1915) I.L.R. 38 Mad. 178: 24 M.L.J. 488.

Appeal under Clause 15 of the Letters Patent against the decree of Hon'ble Mr. Justice Sethuraman, dated 21st December, 1977, and passed in Appeal No. 526 of 1973 (O.S. No. 112 of 1972) Sub-Court, Udumalpet.

S. Palaniswamy, for Appellant.

The Judgment of the Court was delivered by

Ramaprasada Rao CJ.—The unsuccessful second defendant in O.S. No. 112 of 1972 on the file of the Court of the Subordinate Judge, Udumalpet, who could not get relief in this Court in *Ramasami Gounder* v. *Kuppusami Gounder*[1] is the appellant. The plaintiff entered into an agreement of sale with the defendants under Exhibit B-2. A sum of Rs. 10,000 was paid as advance to the defendants by the plaintiff. *Inter alia* there were other terms under which the plaintiff should purchase the property from the defendants. On the foot that the defendants committed breach of contract, the plaintiff filed the suit for the recovery of the sum of Rs. 10,000 together with interest from the date of payment. This was resisted by the defendants on the ground that they did not commit breach and that under the terms of the agreement the sum of Rs. 10,000 was forfeitable. The defence was:

"If the defendants commit default the plaintiff's only remedy was to file a suit for specific performance. In other words, he is not entitled to refund of Rs. 10.000".

The trial Court found that it was the plaintiff who committed the breach of contract and that the plaintiff could only file a suit for specific performance and, therefore, would not get back the sum of Rs. 10,000. In the course of trial, the parties have examined themselves and the defendants spoke through three witnesses. It is common ground that the defendants did not let in any evidence at the time of trial as to the nature of damage and the quantum of damage suffered by them after the agreement of sale was entered into. Obviously, the defence as well as the trial proceeded on the basis that plaintiff's only remedy was to file a suit for specific performance and not ask for a return of the sum of Rs. 10,000 paid as advance under the contract of sale. The result was that there was no pleading about the nature or quantum of damage suffered by the defendants by reason of the breach said to have been committed by then by the plaintiff and the defendants did not let in any oral evidence as well to show that they did suffer actual damage as a result thereof. It was also the contention of the defendants that they were throughout in possession of the property notwithstanding the agreement of sale, though, in the course of trial, it was found that at some time the defendants parted with possession of the land which was a barren land to the plaintiff. We are however concerned at this stage with the above facts and particularly the two important features which loom large in this case, namely that thrre was no pleading as to the nature and quantum of damage suffered by the defendants, there was no proof regarding the same and that the express defence of the defendants was that they were in possession and they did not part with the possession of the land agreed to be sold to the plaintiff. As already stated, the learned Subordinate Judge dismissed the suit. On appeal, Sethuraman, J., agreed with the trial Court that it was the plaintiff who committed default. But, he, however, considered in detail the question whether the plaintiff can have no relief at all in the absence of any proof of damage by the defendants and whether the defendants could unjustly enrich themselves by forfeiting the sum of Rs. 10,000 paid expressly as advance under Ex. B-2. The learned Judge referred to the relevant decisions and particularly to the decision of

1. (1978) 2 M.L.J. 313: 91 L.W. 632.

the Supreme Court reported in *Fateh Chand* v. *Balakrishna Das*[1] which laid down that in assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. The learned Judge also noticed that an undertaking to pay a sum of money or to forfeit a sum of money fixed in *terrorem* without reference to any estimated damages on breach of the contract is in the nature of penalty and that the party claiming compensation must prove the loss suffered by him. In the light of such decisions, the learned Judge said that in the absence of pleading, proof and an issue on the nature and quantum of damage suffered by the defendants, the plaintiff would be entitled to the return of the sum of Rs. 10,000 with interest as claimed. It is as against this, the present Letters Patent Appeal has been filed.

2. Mr. Palaniswamy strenuously contended that as the amount is in the nature of earnest money, it could be forfeited notwithstanding the absence of proof of damage. Reliance was placed upon a decision of our High Court in *Natesa Aiyar* v. *Appavoo Padayachi*[2]. Apart from the fact that we have our own doubts whether, in the light of the later pronouncements of the Supreme Court the ratio of the above decision would still be applicable to the facts of this case, we are bound to point out even at this stage that the parties expressly stipulated that what was paid under Ex. B-2 was not earnest money but advance. It is reasonable also to characterise this amount as advance, since it bears a very great proportion to the totality of the consideration as well. Generally, earnest money forms a small proportion or ratio to the consideration which is agreed to be the consideration to be passed by one to the other under a contract of sale. Having regard to the fact that the amount of Rs. 10,000 was paid, treated and nomenclatured as advance under Ex. B-2, we are unable to agree with Mr. Palaniswamy that the amount paid should be treated automatically as earnest money. Again in the absence of pleading that the defendants have suffered damage to the tune of Rs. 10,000 the plea that the entire amount paid by the plaintiff cannot be demanded and the defendants are not under an obligation to refund it is an extreme contention. We searched in vain for proof of any such sufferance of damage and in fact Mr. Palaniswamy was called upon to refer to such a plea or a statement in the witness box by the witness examined on the side of the defendants. He was unable to refer to any specific statement by the defendants or by the witnesses examined on their side. It was in those circumstances that Sethuraman, J., said that without reference to any actual damage, the amount referred to in the agreement cannot be forfeited, because it would be in the nature of penalty. Proof of actual damage is a *sine quo non* to seek damage. The Supreme Court noticed the inequity in a case where an automatic forfeiture was sought for by a defendant and their conclusion was based upon the principle that nobody can unjustly enrich himself. It was open to the defendants to have pleaded that way, and not only pleaded in that way which they have to in law, but also substantiated the same by acceptable evidence. We have referred to the written statement in which the defendants' case was that the only remedy of the plaintiff was to file a suit for specific performance and they are not entitled to refund the sum of Rs. 10,000. It is in the same perspective that the oral evidence also was let in and there was no express or implied reference to any sufferance of damage by the defendants. It was in these circumstances that Sethuraman, J., rightly held that it was necessary for the party not in breach to prove the actual amount of damages suffered so that to that extent the amount already paid may be allowed to be retained. In the absence of any proof or, as we said, even an allegation in the pleading of such damage, it appears that the learned Judge is right in his conclusion. The appeal is dismissed.

S J. — *Appeal dismissed.*

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1. (1964) 1 An W.R. (S.C.) 60: (1964) 1 M.L.J (S.C.) 60: (1964) 1 S.C.J. 187: (1964) 1 S.C.R. 515: A.I.R. 1963 S.C. 1405.

2. (1915) I.L.R. 38 Mad. 178: 24 M.L.J. 488.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmaniyan, J.*

C.M.K. Ramu Mudaliar .. *Appellant**

v.

Kanthamani Natarajan and another .. *Respondents.*

Transfer of Property Act (IV of 1882) section 106—Evidence Act (I of 1872) section 114—General Clauses Act (X of 1897) section 27—Suit for ejectment—Non-residential building—Notice terminating tenancy sent by registered post—Notice returned unserved—Whether there can be presumption in law of service—Presumption rebuttable.

The owners of a non-residential building had issued a notice to the tenant terminating the tenancy by registered post, but it was returned unserved. According to the postal endorsements on the returned cover, either the tenant was not found in the premises or the premises were found locked, whenever the postman called. The owners filed a suit for ejectment. The trial Court held that there was no notice. However the appellate Court held that there was valid service of notice, relying on section 114 of the Indian Evidence Act. On second appeal by the tenant.

Held: Section 114 of the Evidence Act could scarcely be invoked for establishing the factum of service of notice by post. [*Para.* 4.]

The mere sending by post, without ensuring that the notice was either delivered, or short of delivery, atleast actually tendered to the addressee, would not meet with the requirements of section 106 (of the Transfer of Property Act). [*Para.* 5.]

The different mode of service permitted by section 106 had been enacted only to the end that the landlord could choose the most appropriate and the best practicable means of getting at his tenant. The provisions were meant to ensure effective service and not to countenance non-service.

Section 27 of the General Clauses Act did not lay down any inflexible or conclusive presumption as to service of notice by registered post. All it stated was that the Court might presume service to have been effected by ordinary course of post if those circumstances were present, unless the contrary was proved. In other words, the section did not exclude evidence in rebuttal of the presumption. [*Para.* 8.]

In the face of the unserved notice in this case and in the face of the postal endorsements inscribed on the returned cover indicating that the appellant was not present in the premises on the material dates, the appellate Court was not warranted in holding that the notice to quit must nevertheless be deemed to have reached the appellant in the normal time which postal communications take to reach the place. The endorsements in the postal cover were enough in themselves to rebut the presumption laid down by section 27 of the General Clauses Act. There was no presumption in law that because an addressee was absent from his premises or because his front door was shut during the brief moments of the postman's visits, he was especially seeking to evade service of legal notices addressed to him. [*Para.* 10.].

Case referred to—

A.E.K. Kaliappa Nadar v. *S.V.K.R. Amirthavalavandammal*, (1973) 1 M.L.J. 126: 86 L.W. 1: A.I.R. 1973 Mad. 255.

Appeal against the decree of the Court of the Subordinate Judge, Kancheepuram, dated 4th October, 1974 in A.S. No. 176 of 1972 preferred against the decree of the Court of the District Munsif, Kancheepuram dated 30th August, 1972 in O.S. No. 753 of 1968.

P. Venkataraman and *B.R. Ramesh Babu*, for Appellant.

R. Krishnamurthy and *D. Raju*, for Respondent.

The Court delivered the following

JUDGMENT.—The question which arises in this Second Appeal is whether there was a valid notice terminating the appellant's tenancy of a non-residential building. The evidence showed that the owners of the building had directed their notice to this very address by prepaid registered post, but it was returned unserved. According to the postal endorsements on the returned cover, either the appellant was not found in the premises or the permises were found locked, whenever the postman called. On these facts, the trial Court held there was no service of the notice at all. On appeal, the appellate Court reversed this finding. It held that these facts were sufficient in themselves to raise a presumption in law that the

*S.A.No. 2463 of 1974. *5th July*, 1978.

service of notice in this case was valid and complete.

2. The suit in which this question has arisen is a suit in ejectment of a tenant. It need hardly be said that such a suit can be decreed only where the landlord is able to establish that prior to the suit he had terminated the tenancy by serving on the tenant a valid notice to quit. It becomes, therefore, important to determine whether or not there had been a valid service of the notice in the instant case.

3. The appellate Court upheld the notice relying on section 114 of the Indian Evidence Act, 1872. This section enables a Court of law to presume the existence of any fact which it thinks is likely to have happened, regard being had to the common course of natural events, human conduct and public and private business. The appellate Court said that it was entitled to presume that the appellant had evaded service of notice since he did not explain from the witness box why he was absent from his premises and why the premises were locked when the postman knocked.

4. It seems to me that section 114 of the Evidence Act can scarcely be invoked for establishing the factum of service of notice by post. Surely, it cannot be in the 'common course of natural events' such as night following the day, that a man should be away from his premises for no other reason than to evade service of his landlord's notice. Nor is it natural human conduct to lock one's door as the only effective means of refusing a notice. Besides, it is quite unnatural to assume that a man would shut down his shop and forego his day's earnings, just for the sake of evading a notice. To make such an assumption would be to equate our businessmen with Charle's Lamb's fictional Chinaman who assumed that the only way to roast a domestic pig was to burn the house down.

5. Apparently for the above reasons, learned counsel for the landlords did not rely on section 114 of the Evidence Act to support the judgment of the appellate Court. He rather relied on a nearer statutory provision enacted in section 106 of the Transfer of Property Act, 1882. The section lays down the formal requirements of a notice to quit as well as the modes of service open to the landlord. The relevant part of the section is as under:

"Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or if such tender or delivery is not practicable, affixed to a conspicuous part of the property".

The section contains two distinct provisions. The first deals with the formalities of a notice to quit. It says that it must be signed by the notice-giver or by someone else on his behalf. The second part of the section deals with the manner in which the notice is to be communicated. On this point, the section lays down alternative modes of service. The other is service by post. The section also provides for a third method in cases where either of the former modes is not practicable. Under the mode of personal service, the notice must be tendered to the party concerned or to any member of his family or any servant of his, but the tender must be at the party's residence. Where notice is taken by post, it must be by prepaid registered post. If these methods are not practicable, then, notice may be affixed on the property itself, which is the subjectmatter of the tenancy. It seems to me that the idea behind each of these alternative modes of service is that the party concerned must get to know that he is being sought after for service of notice. It, therefore stands to reason that the mere sending by post, without ensuring that the notice is either delivered, or short of delivery, at least actually tendered to the addressee, would not meet with the requirements of the section.

6. There can be no doubt about the importance attached by the statute to the question of service of notice to quit. It provides the indispensable pre-condition for termination of the tenancy either consensually or through Court process. It, therefore, stands to reason that the mere sending of the notice is not enough; the Court has to make sure that the notice had reached the addressee all right. At the worst, the Cour must at least be satisfied that the notice was actually tendered to the tenant. The different modes of service permitted by section 106 have been enacted only to the end that the landlord can choose the most appropriate and the best practicable means of getting at his tenant. The provisions are meant to ensure effective service and not to countenance non service. It would be ironical to suggest,

as it had been done in this case, that downright non-service of notice must nevertheless pass muster as effective service because of section 106 of the Transfer of Property Act. It is well to remember that the modern tendency of the law is to protect the tenants, as a class, rather than their landlords, if it is a question of protection as between two classes. In this context, therefore, Courts must, in my opinion, resist all forensic attempts to whittle down the requirements as to notice in section 106 of the Transfer of Property Act.

7. Learned counsel for the respondents, however, submitted that even in a case where the tenant actually does not receive the notice, the law presumes service under certain circumstances. He referred to section 27 of the General Clauses Act, 1897, and said that this provision laid down a rule of presumption in respect of service of notice by post. The section says:

> "*Meaning of service by post.*—Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

Learned counsel relied on the above rule of interpretation and urged that the notice in this case must be deemed to have been served on the tenant at the time at which the letter would normally have been delivered in the ordinary course of post.

8. If the argument of the respondents' learned counsel were that the presumption as to validity of serviee under section 27 of the General Clauses Act would hold the field in every case in which the following two facts are found, namely, (*i*) proper address of the tenant in the notice; and (*ii*) despatch by prepaid registered post, I should reject the argument as not based on a proper understanding of the section, As I read it, the section does not lay down any inflexible or conclusive presumption as to service of notice by registered post. All it says is that the Court may presume service to have been effected by ordinary course of post if those circumstances are present, unless the contrary is proved. In other words, the section does not exclude evidence in rebuttal of the presumption.

9. In *A.E.K. Kaliappa Nadar* v. *S.V.K.R. Amirthavalavandammal*[1] cited by learned counsel a notice to quit was issued by a landlord to his tenant by prepaid registered post. The notice was returned with the postal endorsement 'nor found'. In addition to these facts, it was further found, on evidence that the addressee had actually evaded service of the notice. On the facts found thus, the learned Judges held in that case there was valid service of notice to quit. The learned Judges, however, took the opportunity to clearly indicate in their judgment that if all that could be found in that case were: (*i*) the posting of the registered letter and (*ii*) the postal endorsement 'not found' therein, the Court could not properly sustain the finding that the notice had been validly served on the tenant, merely on the foot of those two circumstances. They observed:

> "We do not wish .... to lay down as, inflexible rule that, wherever a letter contained a proper address, it necessarily followed that the addressee had notice of it even when it was returned with the endorsement 'not found.'"

This passage to my mind, correctly reflects the legal position under section 106 of the Transfer of Property Act even if that section were read in association with section 27 of the General Clauses Act.

10. I am satisfied that in the face of the unserved notice in this case and in the face of the postal endorsements inscribed on the returned cover indicating that the appellant was not present in the premises on the material dates, the appellate Court was not warranted in holding that the notice to quit must nevertheless be deemed to have reached the appellant in the normal time which postal communications take to reach the place. In my view, the endorsements in the postal cover are enough in themselves to rebut the presumtion laid down by section 27 of the General Clauses Act. I do not agree with the appellate Court's finding fault with the appellant for not having volunteered any Explanation for his absence from his premises. For, there is no presumption in law that because an

1. (1973) 1 M.L.J. 126; 86 L.W. 1: A.I.R. 1973 Mad. 255.

addressee is absent from his premises or because his front door is shut during the brief moments of the postman's visits, he is especially seeking to evade service of legal notices addressed to him.

11. For these reasons, I allow this second appeal and set aside the decree under which the appellate Court granted possession to the respondents of the premises under the appellant's tenancy. There will, however, be no order as to costs.

S. J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and C.J.R. Paul, JJ.*

The Clan Line Steamers Ltd. — *Appellant (Proposed 4th defendant)**

v.

Gordon Woodroffe and Co., (Madras) and others .. *Respondents (Plaintiff and Defendants 1 to 3)*.

Letters Patent (Madras), Clause 12—Suit for declaration and permanent injunction—Where leave to sue necessary, grant of leave a condition precedent to entertain the suit—In a suit already instituted if the new party is sought to be added again for whom leave to sue is required, Court would grant leave.

Where leave under Clause 12 of the Letters Patent was necessary, the granting of such a leave was a condition precedent to the Court having jurisdiction to entertain the suit; and therefore such leave had to be obtained at the time of the institution of the suit.

If a suit had been instituted against a defendant in respect of whom leave to sue under Clause 12 need not be obtained as he was residing or carrying on business within the jurisdiction of the Court but subsequently a new party was sought to be added, against whom, under Clause 12 of the Letters Patent, leave to sue would be required, inasmuch as he did not reside or carry on business within the jurisdiction of the Court, there could be no objection to the Court granting such leave, for in effect a new suit was being instituted against the new party.

The fact that the suit as originally instituted was instituted without obtaining leave under Clause 12, would not be a bar to the Court granting leave under Clause 12 when a new defendant is sought to be added and when the suit in respect of that defendant could only be instituted after obtaining leave under Clause 12 in view of the fact that that defendant was not residing or carrying on business within the jurisdiction of the Court.

[*Para.* 21.]

Cases referred to:—
Shamchandra Rampratap v. *Bhikamchand Ganeshlal*, A.I.R. 1929 Bom. 468; *Motilal Tribhuvandas Chaksey* v. *Shankarlal*, A.I.R. 1939 Bom. 345- *Bimal Singh Kothari* v. *Muir Mills Co. Ltd.*, A.I.R. 1952 Cal. 645; *Kshitish Kumar Som* v. *State of Bihar*, A.I.R. 1953 Cal. 639; *Laliteshwar Singh* v. *Rameswar Singh*, (1907) I.L.R. 34 Cal. 619; *Rampurtab Samrathrai* v. *Premsukh*, (1891) I.L.R. 15 Bom. 93; *Barasat Basirhat Light Railway Co. Ltd.*, v. *Dt. Board*, 24 *Parganas*, (1944) I.L.R. 2 Cal, 101: A.I.R. 1946 Cal. 23; *Benoy Shankar* v. *Chetsilal* A.I.R. 1952 Cal. 343; *Rampartab Samrathrai* v. *Fcibai and Goolibai*, (1896) I.L.R. 20 Bom. 766; *Devidatt Ramniranjandas* v. *Shri Ram Narayandas*; A.I.R. 1932 Bom. 291; *Amirtalal Mullick* v. *Seth Prakash* A.I.R. 1962 Cal. 8; *Biswanath Agarwalla* v. *Sm. Dhapu Debi Jejodia*, A.I.R. 1960 Cal. 494; *Muthuswami* v. *Krishnaswami* A.I.R. 1952 Mad. 533

Appeal under Order 36, rule 1 of the O. S. Rules against the decree of Mr. Justice S. Padmanabhan dated 30th August 1978 in the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2640 of 1978 in C. S. No. 26 of 1978.

A. C. Muthanna and *Subramaniam*, for Appellant.

S. Chellaswamy, for 1st Respondent.

M. Subramanian and *N. Ramamurthy*, for 2nd Respondent.

A. Arumainathan and *K. N. Karthikeyan*, for 3rd Respondent.

S. Rajaram and *L. Jayakumar*, for 4th Respondent.

The Judgement of the Court was delivered by

Paul, J.—This appeal has been preferred against the order of Padmanabhan, J., on Application No. 2640 of 1978 in C. S. No. 26 of 1978, refusing to revoke the leave to sue granted to the first respondent-plaintiff under Clause 12 of the Letters Patent.

* O. S. Appeal No. 102 of 1978. *6th November*, 1978.

2. The first respondent-plaintiff, M/s. Gordon Woodroffe and Co., (Madras) Private Limited, filed the suit C. S. No. 26 of 1978 on the original side of this Court against respondents 2 to 4 for a declaration that the termination of the plaintiff's appointment as the first defendant's agents at Madras, Kakinada and Visakhapatnam together with the plaintiff's function as the first defendant's co-ordinating agent for the first defendant's trade from India and as the first defendant's controlling agent for Cuddalore, Masulipatinam. Nagapattinam and Trivandrum is illegal, void, inoperative and not binding on the plaintiff and for a permanent injunction restraining the first defendant or their agents or servants or anybody claiming under or through them from interfering with the possession and enjoyment of the property of the plaintiff, namely, Clan Line Agency for the Ports of Madras, Kakinada and Visakhapatnam together with the plaintiff's functioning as the first defendant's coordinating agent for their trade from India and functioning as their controlling agent for Cuddalore, Masulipatnam Nagapattinam and Trivandrum and also restraining the first defendant from taking away the said agency from the plaintiff and from appointing the second or the third defendant or any other person or company or firm as their agents, or in the alternative directing the 1st defendant to pay a sum of Rupees one crore to the plaintiff as and for damages.

3. Among the allegations contained in the plaint, the material ones in so far as this appeal is concerned, are the following: By a written agreement dated 21st September, 1878 entered into between the plaintiff-company and the first defendant, the plaintiff was appointed the sole steamer agent for the Clan Line Steamers Ltd. U.K. and under the agreement the plaintiff acquired 1/64th share of the Clan Line Vessels 'Clan Alpine' and 'Clan Fraser and accordingly the plaintiff invested large amounts of money for building up and expanding the cargo trade in the three ports of Madras, Kakinada and Visakhapatnam and due to the tremendous, extraordinary and special efforts made by the plaintiff, the cargo traffic had increased by leaps and bounds and the plaintiff-company was induced to enter into the aforesaid agreement on the basis that the agency was irrevocable and it was on that basis that the plaintiff expended enormous amounts for building up the agency business: and the plaintiff had always performed the terms of the agency and has always been willing and ready to perform the terms of the agreement. But on 25th October, 1977, the second defendant informed Mr. Vishnu Mohan, one of the Directors of the plaintiff-company that he had received a notice of termination of the agency from the first defendant and on 1st November, 1977 the second defendant showed the notice of termination dated 19th October, 1977. The plaintiff contends that the termination of the agency is arbitrary, capricious and without any valid reason and for no sufficient cause and the reasons given in the letter of termination were totally unfounded and without any basis and the termination of the agency by first defendant was under the erroneous assumption that there was a directive from the Reserve Bank of India to discontinue the agency activities from 1st January, 1978 and the first defendant who is persisting in sticking to its decision has appointed the second defendant as its agent even after knowing that the second defendant had made mispresentation and had manoeuvred to grab the agency for himself at the expense of the company. The plaintiff further contended that it was entitled to reasonable notice before termination of the agency and also for compensation. It might be noted that it was asserted in the plaint that the first defendant was carrying on steamer business in India at Calcutta, Bombay, Cochin and Madras and other ports through agents and the third defendant-company was started by the second defendant for taking over the agency. The plaintiff had filed the suit O.S. No. 450 of 1977 against defendants 2 and 3 for a permanent injunction restraining them from taking over the steamer agency. The present suit C.S. No. 26 of 1978 was subsequently filed.

4. It might be noted that this suit was filed without obtaining leave under clause 12 of the Letters Patent, for it is asserted in the plaint that the cause of action arose at Madras where the first defendant carries on business through its agents. Subsequently, Application No. 1771 of 1978 was filed in the present suit for impleading the Clan Line Steamers Ltd., as the fourth defendant on the ground that the proposed fourth defendant was the principal of the first defendant-company which has been carrying on the business of Clan Line Steamers Ltd., and the Fourth defendant was a necessary party, inasmuch as it is the principal first defendant-company; and Application No. 1742 of 1978 was filed by the plaintiff for leave under Clause 12 of the Letters Patent to institute the suit against the proposed fourth defendant. Leave was thereupon granted on

20th April, 1978. It is to revoke that leave that Application No. 2640 of 1978 was filed by the fourth defendant.

5. It was contended on behalf of the proposed fourth defendant that the suit should have been filed against the first defendant, only after obtaining leave under clause 12 of the Letters Patent. Inasmuch as it has been asserted in the plaint that the first defendant is carrying on business in Madras through its agent leave to sue under clause 12 was not obtained when the suit was instituted. Since the other defendants themselves raised the contention that the proposed fourth defendant was a necessary party to the suit and the suit was bad for non-joinder, the plaintiff had to file the application for impleading the proposed fourth defendant and since the proposed fourth defendant is carrying on business in London, leave has to be necessarily obtained under clause 12 of the Letters Patent before the proposed fourth defendant is actually impleaded in the suit.

6. Padmanabhan, J. after considering the matter with reference to the authorities cited by both sides rejected the contention advanced on behalf of the proposed fourth defendant that when the plaintiff seeks to add the proposed fourth defendant as a party, leave cannot be granted by this Court under clause 12 of the Letters Patent, since leave had not been originally granted at the time of the institution of the suit. He also found that the balance was also in favour of not revoking the leave already granted. The proposed fourth defendant has therefore come up in appeal against that order.

7. It has been contended by Mr. Govind Swaminathan on behalf of the appellant first of all that since leave to sue had not been obtained when the suit was originally filed the suit is *non est* and consequently there can be no question of adding a new party or obtaining leave in that suit under clause 12 of the Letters patent subsequent to the institution of the suit even on the ground that a new party is proposed to be added; and secondly that if leave to sue should have been obtained at the time of the institution of the suit that defect cannot be cured by now asking for leave to sue on the ground that a new party is proposed to be added.

8. With regard to the first contention of Mr. Govind Swaminathan that since leave to sue had not been obtained against the first defendant at the time of the institution of the suit, the suit is *nonest* and as such there cannot be any addition of any new party and asking for leave to sue in respect of that party, we have to mention that while disposing of O.S.A. No. 22 of 1978 preferred by the plaintiff against the order dismissing his application for injunction, we had dealt with the objection of the first defendant that the suit against him is not maintainable at all in view of the fact that leave to sue had not been obtained under clause 12 of the Letters Patent, even though the first defendant does not actually carry on any business within the jurisdiction of this Court and we observed:

> "As regards the objection based on clause 12 of the Letters Patent that no leave to sue has been obtained before the filing of the suit even though the first respondent does not carry on any business within the jurisdiction of this Court, we are *prima facie* of the view that the first respondent should be deemed to be carrying on its business within the limits of this Court through its agent, the appellant and on the date of suit, therefore, the question of obtaining leave to sue does not arise. The question whether the first respondent carried on business through its agent within the limits of this Court is also a matter that requires elaborate consideration at the time of the trial after evidence is let in."

Therefore it cannot be contended at this stage that that the suit filed against the first defendant is *non est*. It is only during the trial of the suit after evidence is let in that it could be decided whether or not the first defendant is carrying on business within the jurisdiction of this Court through its agents and if it is eventually found that the first defendant is not carrying on any business within the jurisdiction of this Court through its agents and as such leave to sue should have been obtained under clause 12 of the Letters Patent and for want of such leave the suit is not maintainable, the legal consequence arising from that situation would necessarily follow as has been pointed out by Padmanabhan, J As far as the first defendant is concerned, undoubtedly, if leave to sue was required under clause 12 of the Letters Patent and if it had not been obtained at the time of the institution of the suit, that defect cannot be cured by subsequently granting leave to sue under clause 12 of the Letters Patent. That is a well-settled proposition of law which cannot be disputed.

9. Where leave under clause 12 is necessary, the granting of such leave is a condition precedent to the Court having jurisdiction to entertain the suit, and therefore such leave has to be obtained at the time of the institution of the suit. (*vide-Shamchandra Rampratap and others* v. *Bhikamchand Ganeshlal and others*[1], *Motilal Tribhovandas Choksey* v. *Shankarlal Chhaglal*[2], *Bimal Singh Kothari and another* v. *Mur Mills Co. Ltd. and others*[3], *Krishitish Kumar Som* v, *State of Bihar*[4] and *Laliteshwar Singh* v. *Rameswar Singh*[5].

10. Mr. Govind Swaminathan on behalf of the appellant has contended that inasmuch as the suit was not originally instituted after obtaining leave under clause 12, subsequently leave under Clause 12 cannot be asked for or obtained even when, by way of amendment, a new cause of action or an alternative cause of action is sought to be introduced or an additional party is sought to be impleaded and consequently leave to sue in so far as the proposed fourth defendant is concerned, should not have been granted. In support of his contention, Mr. Govind Swaminathan has relied first of all on the decision in *Motilal Tribhovandas Choksey* v. *Shankarlal Chhanganlal.*[2] That was a case where a suit was filed by 6 partners in a firm against the defendant alleging that the defendant had given instructions to the six plaintiffs to effect transactions on his behalf and they worked as his brokers and as a result of carrying out the transactions those 6 plaintiffs had suffered a loss and they claimed the same from the defendant. Since the defendant was a resident of Surat it was asserted in the plaint that a part of the cause of action had arisen in Bombay within the jurisdiction of the Bombay High Court and as such leave under clause 12 of the Letters Patent was obtained at that stage and the plaint was filed. But subsequently when the defendant appeared in response to the summons he raised the contention that he had dealings only with an individual Motilal Tribhovandas Choksey and not with the plaintiff firm and that the firm, namely, the six plaintiffs together had no cause of action against him at all. Thereupon the learned Chamber Judge granted unconditional leave to defend to the defendant. (The suit was filed as a summary suit) and thereafter the plaint was amended and Motilal Tribhovandas Choksey, the individual continued the suit in his own name, but no leave under clause 12 of the Letters Patent was obtained at the time when the amendment was made. It was held by the learned Judge (Kania, J.) of the Bombay High Court that the obtaining of leave under clause 12 of the Letters Patent was the foundation of the jurisdiction and such leave must be obtained before the institution of the suit and cannot be granted afterwards and further as held in *Ramputab Samruthroy* v. *Premsukh Chandanmal*[1] the leave granted was confined to the cause or causes of action set forward in the plaint at the time the leave was granted and hence the plaint cannot be amended so as to alter the cause of action and if an amendment, which would alter the cause of action was made, it necessarily follows that fresh leave should be obtained in respect of the altered cause of action and no leave having been obtained when Motilal, the individual, desired to carry on the suit, the suit has to be dismissed. It might be noted that Kania, J. did not consider the question as to whether leave to sue under clause 12 of the Letters Patent could have been asked for and obtained before the plaint was sought to be amended by altering the cause of action.

11. The next decision cited by Mr. Govind Swaminathan is the one in *Barasat Basirhat Light Railway Co. Ltd.* v. *District Board 24 Parganas.*[2] There the defendant-Board neither resided nor carried on business within the jurisdiction and only part of each cause of action arose within the jurisdiction and consequently leave of the Court was required before the Court could entertain any of the claims in the suit and leave was obtained under clause 12 of the Letters Patent to institute the suit at the time when the only claim made was under certain agreements. But by an amendment, the company, in the alternative, claimed reliefs under sections 65, 70 and 72 of the Indian Contract Act. It was held that the new reliefs asked for were not different forms of relief in respect of the cause of action originally contained in the plaint but each was a fresh cause of action, for which leave was required under clause 12 of the Letters Patent. Referring to the decision in *Ramputab Samruthroy* v. *Premsukh Chandanmal*[1], where it was

1. A.I.R. 1929 Bom. 468.
2. A.I.R. 1939 Bom. 345.
3. A.I.R. 1952 Cal. 645.
4. A.I.R. 1953 Cal. 639.
5. I.L.R. 34 Cal. 619.

1. (1891) I.L.R. 15 Bom. 93.
2. (1944) I.L.R. 2 Cal. 101: A.I.R. 1946 Cal. 23.

held that the grant of leave is a judicial act relating solely to the cause of action set forth in the plaint at the time leave was obtained and that such leave affords the very foundation of the jurisdiction and is not available to confer jurisdiction in respect of a different cause of action which was not judicially considered at the time leave was granted and that subsequently the plaint cannot be amended so as to alter the cause of action and that therefore the Court cannot try a different cause of action save in another suit, Gentle, J. of the Calcutta High Court held that the grant of leave is a condition precedent to the Court having jurisdiction to receive such a suit and an amendment to a plaint raising a new cause of action upon which a claim is made is not a fresh suit but is an additional claim made in an existing suit. It was pointed out that leave to sue was not sought with respect to the cause of action in the amendment either at the time application was made to amend or when leave was given for the amendment or when the plaint with the amendment was presented to the Court and as such the Court had no jurisdiction to receive, try and determine the claims upon the causes of action in the amendment to the plaint since leave was not previously obtained in respect of those causes of action before the suit in which those claims are made was instituted. But then, the learned Judge did not consider or decide the question whether leave to sue can be asked for and obtained with respect to the new causes of action at the time when the application was made to amend. Nevertheless, since the learned Judge has pointed out that leave to sue was not sought for, either at the time when the application was made to amend or when leave was given for the amendment it would appear that he was of the view that leave to sue could have been asked for and obtained at the time when the application to amend the plaint was made.

12. The third decision cited by Mr. Govind Swaminathan is the one in *Kshitish Kumar Son v. State of Bihar*.[1] In that case the learned single Judge of the Calcutta High Court, while dealing with an application for amendment of the plaint, by which amendment the cause of action was sought to be altered and a new cause of action added, held that no such amendment can be ordered if it required leave to be granted under clause 12 at the time of the amendment, and it follows that leave under clause 12 cannot be granted in such a case at any stage after the institution of the original suit. The learned Judge after referring to a number of authorities, namely, *Laliteshwar Singh* v. *Rameshwar Singh*,[1] *Rampurtab Samruthroy* v. *Premsukh Chandamal*,[2] *Motilal Tribhovandas* v. *Shankarlal Chhaganlal*[3], *Barsast Basirhat Light Railway Co. Ltd.* v. *District Board*[4] and *Benoy Shankar* v. *Chhotelal*,[5] summarised the result of those authorities as follows:

"1. Where leave under clause 12 of the Letters Patent is necessary, the granting of such leave is the condition precedent to the Court having jurisdiction to entertain the suit.

2. Therefore, such leave is to be obtained at the time of the institution of the suit.

3. Where by amendment of a plaint, a cause of action is altered or a new cause of action added, it is not a new suit but the old suit in a new form. In such a case, no amendment can be ordered if it requires leave to be granted under clause 12 of the Letterse Patent at the time of the amendment.

4. It follows that leave under clause 12 of the Letters Patent cannot be granted in such a case, at any stage after the institution of the original suit.

5. But where a new party is added, the suit as regards the added party must be deemed to have been commenced on the date when he was so added. Consequently, if the cause of action against the added party requires leave under clause 12 of the Letters Patent it is open to the Court to grant such leave, if asked for at the time of the amendment, and if such leave has not been asked for or obtained in such a case, the Court has no jurisdiction to entertain the suit against such an added defendant."

13. We notice that in the aforesaid decision a distinction has been made between suits in which by amendment of plaint, the cause

1. A.I.R. 1953 Cal. 639.

1. (1907) I.L.R. 34 Cal. 619.
2. (1891) I.L.R. 15 Bom. 93.
3. A.I.R. 1939 Bom. 345.
4. A.I.R. 1946 C I. 23.
5. A I.R. 1952 Cal. 343.

of action is altered or a new cause of action is added and suits in which a new party is sought to be added, and the cause of action against the party proposed to be added, requires leave under clause 12 of the Letters Patent, and it has been held that in the former case leave under clause 12 cannot be granted after the institution of the original suit, but in the latter it is open to the Court to grant such leave if asked for at the time of the amendment. It might be noted that the case now before us would come under the latter category.

14. In *Rampartab Samrathrai and another* v. *Foolibai and Goolibai*[1], it was held that where a defendant is added who does nor reside within the jurisdiction of the High Court and against whom the cause of action has not arisen wholly within that jurisdiction leave must be obtained afresh under clause 12 of the Latters Patent even if leave had been obtained when the suit was originally filed. Now, it might be noted that in the case before us the proposed fourth defendant who is sought to be added does not reside within the jurisdiction of this Court and the cause of action against him has not arisen wholly within the jurisdiction of the Court and as such leave must be obtained under clause 12 of the Letters Patent afresh to sue him even if leave had been obtained when the suit was originally filed, and the fact that leave had not been obtained when the suit was originally instituted, would not in anyway affect the request for lease asked for when the proposed fourth defendant is sought to be added. The aforesaid decision appears to support the contention of Mr. Chellasami for the respondent that leave can be obtained under clouse 12 of the Letters Patent when a new defendant who does not reside within the jurisdiction of the Court and against whom the cause of action has not arisen wholly within that jurisdiction is sought to be added.

15. In *Devidatt Ramniranjandas* v. *Shriram Narayandas*[2] when the suit was instituted the plaintiffs obtained leave under clause 12 of the Letters Patent on the allegation that the material part of the cause of action had arisen in Bombay. But when however some defendants were subsequently added as party defendants, the plaintiffs did not obtain fresh leave under clause 12. It was held that the force of an order granting leave was exhausted when the suit was filed and where a defendant who was not residing within the jurisdiction was added after the institution of the suit, fresh leave must be obtained at the time of the application to add him as a party if the cause of action had arisen in part only within the jurisdiction. This decision also lends support to Mr. Chellasami's contention.

1. (1896) I.L.R. 20 Bom. 766.
2. A.I.R. 1932 Bom. 291.

16. In *Amritalal Mullick* v. *Sesh Prakash Mullick*[1] it has been observed by the learned Judge of the Calcutta High Court that "in a suit when a new party is sought to be added by way of amendment, the suit is a new suit as against the added party. When amendment is allowed and order made in that behalf a new suit comes into existence. It is not emphatically the old suit. If the new suit cannot be "received, tried and determined" by this Court under clause 12 of the Letters Patent, why should the leave be not asked for and granted by the Court? Ordinarily a suit is initiated by the presentation of the plaint and when the Court accepts it and has it registered and numbered, the plaint is "received" by the Court. The Code also provides that after the institution of a suit a party can be added and the law is that so far as the added parties are concerned, it is a new suit. It is only when the order adding a new party is perfected and plaint amended that the Court can be said to have received a suit so far as the added party is concerned. It follows that in suits in which leave under clause 12 of the Letters Patent is necessary before the order of amendment is prayed for, leave under clause 12 becomes necessary if not imperative. It is a fallacy to contend that a suit can be initiated only by presentation of the plaint and the Court "receives" a suit when it accepts the plaint and not otherwise. A suit can also be initiated against a new party by making an application for amendment and the Court receives the suit as against him when after granting leave the Court adds the party and then amends the plaint by bringing the new party on record. The presentation of the plaint and registration of the suit is therefore, not the only way in which the Court "receives" a suit in law. For reasons given above a suit instituted after obtaining leave under clause 12 of the Letters Patent can be amended in law and there is nothing in the wording of clause 12 of the Letters Patent to prevent the Court from granting leave under clause 12 to amend the plaint by adding

1. A.I.R. 1962 Cal 8.

parties, in the case of a suit instituted after obtaining leave under clause 12 of the Letters Patent."

17. Mr. Govind Swaminathan, however, emphasiss the words, "there is nothing in the wording of clause of the Letters Patent to prevent the Court from granting leave under clause 12 to amend the plaint by adding parties, *in the case of a suit instituted after obtaining leave under clause 12 of the Letters Patent*" and he has argued that, inasmuch as the suit as originally framed was not instituted after obtaining leave under clause 12 of the Letters Patent leave cannot now be asked for under clause 12 even when new parties are to be added. In other words, his argument is that leave under clause 12 of the Letters Patent could be asked for and obtained when new parties are added only when originally the suit had been instituted after obtaining leave under clause 12 of the Letters Patent and since in this case leave under clause 12 was not obtained before filing the suit as it was originally framed, the Court cannot grant leave under clause 12 even when new parties are sought to be added. We are however unable to agree with this contention of Mr. Govind Swaminathan, for the preponderance of authorities does not support that contention.

18. In *Biswanath Agarwalla* v. *Smt. Dhapu Dabi Jajodia and others*[1] it was held that in a suit for land partly situate within and partly outside jurisdiction, instituted after obtaining leave under clause 12 no fresh leave for amendment is necessary if the plaint is subsequently amended, by introducing a new cause of action relating to land situate wholly within the jurisdiction of the Court. It was observed that by the amendment a new suit, as it were is being instituted and since it relates to a land situate wholly within the jurisdiction of that Court no leave under clause 12 of the Letters Patent is necessary. We are of the view that if a suit had been instituted against defendant in respect of whom leave to sue under clause 12 need not be obtained since he is residing or carrying on business within the jurisdiction of the Court but subsequently a new party is sought to be added, against whom, under clause 12 of the Letters Patent, leave to sue would be required, inasmuch as he does not reside or carry on business within the jurisdiction of the Court, there could be no objection to the Court granting such leave, for in effect a new suit is being instituted against the new party.

19. Clause 12 of the Letters Patent says that the High Court of Judicature at Madras, in exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits. On the ground that the first defendant is carrying on business through his agent within the jurisdiction of the Court, the plaintiff did not obtain leave under clause 12 of the Letters Patent, for such leave under clause 12 of the Letters Patent would not be necessary if the defendant at the time of the commencement of the suit was dwelling or carrying on business or was personally working for gain within the limits of the jurisdiction of this Court. But the proposed fourth defendant is not dwelling, carrying on business or personally working for gain within the jurisdiction of this Court and as such leave should be obtained under clause 12 only against the proposed fourth defendant. The suit against the proposed fourth defendant would be a new suit and even if the suit against the first defendant is held to be not maintainable eventually, on the ground that leave under clause 12 of the Letters Patent had not been obtained, the suit against the other defendants, including the proposed fourth defendant, would still remain unaffected. Such being the case, we do not think that the question of grant of leave under clause 12 as against the proposed fourth defendant in any way hinges upon the question as to whether the suit against the first defendant had been properly received by obtaining leave under clause 12 of the Letters Patent. We are unable to accept the contention of Mr. Govind Swaminathan on behalf of the appellant that in as much as in most of the decisions referred to by us above the suits had been originally instituted after obtaining leave under clause 12 of the Letters Patent and when an additional defendant was sought to be added after obtaining leave under clause 12 of the Letters Patent, the Court granted such leave afresh in the case of the

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1. A.I.R. 1960 Cal. 494.

defendant sought to be newly added, this Court cannot grant leave under clause 12 of the Letters Patent and allow the proposed fourth defendant to be impleaded since originally the suit was instituted against the 1st defendan without obtaining leave under clause 12 of the Letters Patent.

20. Mr. Chellaswamy on behalf of the first respondent—plaintiff raises also the question of waiver and submission to the jurisdiction of this Court; but we do not think that there is any submission to the jurisdiction of this Court or any waiver, for at the earliest opportunity he objection had been taken.

21. It should be noted that the application for impleading the proposed fourth defendant had to be filed because of the contention raised by the other defendants that the proposed fourth defendant is a necessary party to the suit and the suit is bad for non-joinder of necessary parties. It should also be noted that on behalf of the plaintiff- company it is contended that when the suit was originally filed there was no necessity to obtain leave of Court, because according to the assertions made in the plaint, the first defendant is carrying on business through its agent in Madras. But since the proposed fourth defendant is carrying on business in London leave has to be necessarily obtained before he is added as a party. Such being the case the fact that the suit as originally instituted was instituted without obtaining leave under clause 12, would not be a bar to the Court granting leave under clause 12 when a new defendant is sought to be added and when the suit in respect of that defendant can only be instituted after obtaining leave under clause 12 in view of the fact that that defendant is not residing or carrying on business within the urisdiction of the Court.

22. In *Muthusami* v. *Krishnaswami*[1] the suit as originally filed was for specific performance of a contract for the sale of certain lands in Salem District entered into at Madras and for an injunction restraining the second defendant from bringing about a breach of the said contract and leave was obtained under clause 12 of the Letters Patent. But subsequently on the plaintiff coming to know that the second defendant claimed to be a purchaser of the same property under a sale deed, filed an application for amendment of the plaint contending that the sale in favour of the second defendant was sham and nominal and the second defendant was not a *bona fide* purchaser for value without notice and added the relief of directing the execution of the sale deed by the second defendant also and along with the application for amendment an application for leave to sue on the basis of the plaint sought to be amended was also filed. The question that arose for consideration was, "does the circumstance that previous leave to institute had been obtained in a suit disentitle the plaintiff from asking for an amendment of the plaint in the suit so instituted?" While considering the question, the decisions in *Rampurtab* v. *Premsukh*[1] *Motilal* v. *Shankaralal*[2] and *Barasat Basrihal Light Railway Co. Limited* v. *District Board 24 Parganas*[3] were considered; and the learned Judge held as follows:

> "I am of opinion that in cases where the Court, on an application of the plaintiff, considers that the plaint has to be amended so as to include a cause of action, which was not originally in the plaint, on the ground that such an amendment is necessary, it does not prevent the Court from granting such an amendment merely for the reason that it was a suit instituted after obtaining previous leave to sue under clause 12 of the Letters Patent. It does not also preclude the plaintiff from giving effect to such an order by carrying out the amendment or presenting an amended plaint, before which, however he should apply for and obtain leave to sue on the cause of action described in the amendment under clause 12 of the Letters Patent. Such an application for leave can be filed and leave can be granted, if it comes within the scope of clause 12 of the Letters Patent."

These observations indicate that even when a plaint is amended by introducing a new cause of action, a Court can grant leave under clause 12 of the Letters Patent and that there is nothing in clause 12 of the Letters Patent to show that the plaint instituted under clause 12 would not include an amended plaint and if an amended plaint after obtaining the leave to amend is to be received and the cause of action arising

1. A.I.R. 1952 Mad. 533.

1. (1891) I.L.R 15 Bom 93.
2. A.I.R. 1939 Bom. 345
3. I L R. (1944) 2 Cal 101.

therein is to be tried and determined which cannot be done without previous leave being obtained, there is no reason why such leave to present an amended plaint should not be granted under clause 12 on a fresh application stating the cause of action on which the amendment has been applied for and the reasons for grant of leave under clause 12. This decision of course is in conflict with the view of the Calcutta High Court in *Kshitish Kumar Son* v. *State of Bihar*[1] in so far as amendments of plaints, introducing a new cause of action is concerned. In the case now before us, no new cause of action is sought to be introduced. The reason for adding in Clan Line Steamers Ltd., as the fourth defendant and for amending the plaint is to claim the same reliefs against the Clan Line Steamers Ltd., in *respect of the same cause of action.*

23. Coming now to the question of the balance of convenience which was also considered by Padmanabhan, J., it has been held in *Mimal Singh* v. *Muir Mills Co. Limited*[2] as follows:

> "In considering the question whether leave granted should be revoked or not, the question of convenience is a material factor, though the convenience of the parties is not to be weighed in a delicate balance. The nature of the suit and the question of comparative expenses are material considerations. But mere balance of convenience is not enough. It must be proved to the satisfaction of the Court that either the expenses or the difficulties of trial in this Court are so great that injustice will be done to the defendant. But at the same time, the Court ought not to exercise the jurisdiction, if by so, doing an injustice is caused to the plaintiff."

24. Again in regard to the principle to be followed by the Appellate Court in interfering with an order passed by a trial Judge refusing to revoke a leave granted under clause 12 of the Letters Patent it has been observed in the said decision as follows:—

> "The revocation of leave is entirely a matter of discretion with the trial Judge and a Court of Appeal will be very slow to set aside the discretion, unless it is proved that he has misdirected himself as to the facts or on the law. It may be that the Court of Appeal does not see eye to eye with the trial Judge in such matter, but that is no ground for setting aside the discretion exercised by the trial Judge.

In *Bhulka Bros Ltd.* v. *Govindram Bros. Ltd.* (an unreported decision) which has been referred to in the above decision it was held as follows:

> "The plaintiff is the *dominus litis* and has the right to choose his own forum. This right of choice is, however, not absolute, and the Court has the power in a proper case to interfere with the plaintiff's choice and revoke leave if the Court considers that the forum has been chosen by the plaintiff '*mala fide*' or that the forum chosen is such that if the Court permits the suit to go on, the other party would be so handicapped in his defence that it would lead to injustice or that the balance of convenience is decided by or overwhelmingly against the suit going on in the forum chosen by the plaintiff".

It is asserted now before us on behalf of this respondent-plaintiff that the entire evidence regarding the subject-matter of the suit would be available only in Madras, for the main ground on which the suit has been filed is that the second defendant, who was the chairman of the plaintiff-company at the relevant time misused his position as chairman of the company and the trust reposed in him as such chairman and induced the proposed fourth defendant and the first defendant to terminate the agency of the plaintiff and give it to the third defendant company which was formed by the second defendant. Further, in the case now before us there are no circumstances which would show that the plaintiff has chosen this forum *mala fide*, nor can it be said that the forum chosen is such that if the Court permits the suit to go on, the other party would be so handicapped in his defence that it would lead to injustice or that the balance of convenience is decidedly or overwhelmingly against a suit going on in the forum chosen by the plaintiff.

25. We therefore find that Padmanabhan, J. was right in having refused to revoke the leave which he had granted under clause 12 of the Letters Patent to sue the proposed fourth defendant. This appeal is therefore dismissed with costs.

S.J. —— *Appeal dismissed.*

1. A.I.R. 1953 Cal. 639.
2. A.I.R. 1952 Cal. 645.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*T. Sathiadev, J.*

Arumugham and 3 others *Petitioners*[*]

v.

Arumugham *Respondent.*

Civil Procedure Code (V of 1908), section 107 (2), Order 26, rule 9 and Order 41 rule 27—Appointment of Commissioner by Appellate Court to find out the physical feature and location of channel—Whether proper.

When the appellate Court is invested with the power to take additional evidence or to require such evidence to be taken, if the lower appellate Court can go to the extent of recording additional evidence if the ends of justice require, there could nothing against the lower appellate Court appointing the same Commissioner already appointed in the case by revising the warrant to find out the location the concerned channel and the Court considers it relevant for the disposal of the appeal. [*Para* 2]

Cases referred to:—

P. Moosa Kutty, In re, (1953) 1 M.L.J. 632: 66 L.W. 418: A.I.R. 1953 Mad. 717; *J. R. Rajagopala Iyer*, v. *T. R. Ramachandra Iyer*, (1968) 81 L.W. 374.

S. Thyagarja Iyer, for petitioner.

R. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT.—The issue involved whether in the appellate Court a Commissioner can be appointed for the purpose of finding out the physical features and of the location of the channel, particulary when the matter was pending in the trial Court and there had been two inspections, one on 19th November, 1974 and the other on 12th December, 1974. It appears that the I.A. No. 601 of 1976 was filed by the respondent herein for the same purpose, for which the present commission is being issued. But it was dismissed on 19th November, 1976, since the respondent herein did not press for the same. On this Mr. Thyagaraja Iyer pleads that when the very aspect now involved has already, been posed before the trial Court in I.A. No. 601 of 1976, and the respondent herein having not interested himself in asking for the Commissioner to again visit the property, the appellate Court was not justified in directing the appointment of the Commissioner. He contends that there is no jurisdiction in the appellate Court appointing a Commissioner in matters like this and relies upon the decision in *P. Moosa Kutty* In re,[1] to show that the power conferred on the appellate Court under Order 41, rule 27 read with section 107 (2), and Order 26 rule 9 Civil Procedure Code disentitle the appellate Court from appointing a second Commissioner. But in this case, it will be seen that the appellate Court has only directed the same Commissioner to do the injunction and commission warrant had been reissued with a direction to find out whether the channel leading to the defendant's land is in the patta land of the plaintiffs or in the purambok land. The counsel for the pettioners then refer me to the decision in (1968) 81 Law Weekly 374 (*J. R. Rajagopala Iyer* v. *T. R. Ramachandra Iyer*). I find the learned Judge in that case holding that the lower appellate Courts cannot, as a matter of course appoint a Commissioner merely because it has the power to do so. It should first of all, find out whether the circumstances justify the appointment of a Commissioner. It has been held that the appellate Court has the power, but unless the merits of the matter justify, there can be no question of a fresh Commissioner being appointed.

2. In this context reference is also made to the power of the appellate Court under Section 107, Civil Procedure Code to show that there is no power in the appellate Court to appoint a Commissioner. I do not think such a contention can be entertained, particularly in view of the decision of this Court in 81 Law Weekly 374 (J.R. *Rajagopala Iyer*, v. *T.R. Ramachandra Iyer*,) and when the appellate Court is invested with the power to take additional evidence or to require such evidence to be taken, if the lower appellate Court can go to the extent of recording additional evidence if the ends of justice require in matters like this, there could be nothing against the lower appellate Court appointing the same Commissioner by reissuing the warrant to find out the location of the channel and if the Court considers it relevant for the disposal of the appeal.

*C.R.P. No. 1660 of 1978.

25th October 1978

1. 66 L.W. 418: (1953) I M.L.J. 632: A.I.R. 1953 Mad. 717.

3. Counsel for the petitioner pleads that it will be open to him to place before the lower appellate Court the particulars which are required to be collected by the Commissioner, and as to which of them, are irrelevant and extraneous to the matter involved in the suit. Hence, the Court below shall take into account such objections, if any taken and dispose of the same on their merits, when the report is filed,

4. One other aspect that requires to be considered is about the Court below directing the plaintiff to pay the costs involved in the appointment of the Commissioner. It is clear that the Court below had not taken into account the fact that the necessity for the appointment of a Commissioner had arisen, merely because the respondent had preferred an appeal, and as already stated, it was the respondeot who filed I.A No. 701 of 1976 seeking for the reissue of the commission and when such a commission is issued the defendant-appellant, respondent herein has to pay the costs of the Commissioner and the Court can only collect the costs of the Commission from the respondent herein. To this extent the order is set aside and the C.R.P. is allowed and in other respects, the civil revision petition stands dismissed' No costs.

R.S. ——— *Revision Partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Johara Bivi .. *Petitioner (Plaintiff)**

v.

Julaika Bivi and others .. *Respondents (Defendants).*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), sections 39 and 50—Suit for administration of the estate of a Muslim 'A by his widow-Court-fee paid as provided by sections 39 and 50 of the Act—Administration suit whether maintainable—Court-fee paid whether correct.

The plaintiff was the widow of Ameer Batcha Rowther who died on 25th January, 1972. The plaintiff claimed 1/8th share in the net estate of the deceased after making provisions for various items like funeral expenses, "iddat" etc. The suit was valued for the purposes of jurisdiction at Rs. 8,500 as the probable value of the plaintiff's share and a Court-fee of Rs. 100 was paid thereon under section 39 read with section 50 of the Act XIV of 1955 The plaintiff undertook to pay any additional Court-fee which may be leviable in respect of the decree to be passed in her favour at any time as the Court may order payment of the same on ascertaiment of the actual decree to be passed in the suit. The defendants contended that the Court-fee paid was not proper. An issue regarding the payment of Court-fee was framed. It was taken up as a preliminary issue and the trial Court held the payment of Court-fee by the plaintiff was not proper and the suit should have been filed as a partition suit. In revision by the plaintiff, Held that the authorities go to show that in the case of Mohammedans, the proper remedy would be a suit for administration especially in cases where the residue of the property has to be ascertained and the share of the plaintiff has to be allotted. The residue has to be ascertained after making the provisions prayed for. The Court-fee paid in the present case was proper and it is not necessary to value the reliefs under section 37 read with section 22 of the Tamil Nadu Court-fees and Suits Valuation Act. [*Paras.* 9, 11.]

Cases referred to:—

Mt. Amir Bi v. *Abdul Rahim Sahib*, (1928) 55 M.L J. 266: 28 L.W. 583: A.I.R. 1928 Mad 760;

*C.R.P. No. 1941 of 1976. *5th January,* 1979

Moideensa Rowther v. *M/s. Asim Rowther*, (1915) 28 I.C. 896: I.L.R. 37 All 177; *Abdul Karim Sahib* v. *Badruddin Sahib* (1905) I.L.R. 28 Mad. 216 *Essafally Alibhai* v. *Abdeali Gulam Hussain*, (1921) I.L.R. 45 Bom. 75; *Mahabub Alam* v. *Razia Begum*, A.I.R. 1950 Lah. 12; *Nazarali Kazamali* v. *Fazian Bibi*, A.I.R. 1975 Guj. 81; *Nambikai Mary Ammal* v. *Prakasa Mary*, (1959) 2 M.L.J. 120.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Kumbakonam dated 7th April, 1976 and made in O.S. No. 41 of 1974.

S.M. Hameed Mohideen, for Petitioner.

N. Sankaravadivel, for Respondent Nos. 1 to 4 and 6 to 8.

R. Vijayam, for Respondent No. 10.

Sivaji, for Government Pleader.

The Court made the following

ORDER.—The Civil Revision Petition has been filed by the plaintiff in O.S. No. 41 of 1974 in the Court of the Subordinate Judge of Kumbakonam. The plaintiff has filed the suit for administration of the estate of the deceased S.M. Ameer Batcha Rowthar by providing for the death-bed charges funeral and other expenses of the deceased, for the payment of her "Iddat" amount, for provision for the marriage expenses of the 5th Defendant and for allotting 1/8th share in the remaining estate to her on a fair and equitable basis. The Court fee was paid as provided by section 39 read with section 50 of the Court fees Act. The defendants contended that the Court fee paid was not proper, Issue No. 15 framed in the case runs as follows:

> "Is the suit as framed for administration not maintainable and whether proper Court-fee not paid:"

This issue was taken up for decision as a preliminary issue and the learned Subordinate Judge took the view that the payment of Court fee by the petitioner in accordance with the provisions of section 39 read with section 50 of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955 was not proper and that the suit should have been filed as a suit for partition and the Court fee paid in accordance with the provisions of section 37 of the Court-fees Act and that the other reliefs should have been valued in accordance with the provisions of section 22 of the Court-fees Act. It is this decision of the learned Subordinate Judge that has given rise to the present revision petition filed by the Plaintiff Petitioner.

2. Notice has been given to the Government Pleader and his representative was heard.

3 Firstly, the nature of the suit filed in the present case has to be determined in order to find out whether section 37 read with section 22, or section 39 read with section 50 of the Tamil Nadu Court-fees and Suits Valuation Act would apply to the case. The plaintiff is the widow of Ameer Batcha Rowther who died on 25th January 1972. The plaintiff claimed 1/8th share in the net estate of the deceased, after making provisions for the various items like funeral expenses "Iddat" *etc.* The suit was valued for the purpose of jurisdiction at Rs. 8,500 as the probable value of the plaintiff's share and a Court-fee of Rs. 100 was paid thereon under section 39 read with section 50 of the Act. The plaintiff undertook to pay any additional Court-fee which may be leviable in respect of the decree to be passed in her favour at any time as the Court may order payment of the same on ascertainment of the actual decree to be passed in suit. The prayer in the plaint runs as follows:—

> "Plaintiff therefore most humbly prays for a decree: (1) for administration of the estate of the deceased S.M. Ameer Batcha, Rowther, by providing for the death-bed charges of the deceased as may be "allowed by this Honourable Court, for the funeral and other expenses of the deceased be allowed by this Hon'ble Court for the payment of the "Iddat" amount to plaintiff as may be allowed by this Hon'ble Court, for securing a sum of Rs. 2,000 in deposit with such Bank as may be decreed by this Honourable Court for the marriage of the 5th defendant, and for allotting 1/8th share in the remaining estate of the deceased to the plaintiff on a fair and equitable division to be made by this Honourable Court".

There are also prayers for payment of costs and for such further orders as may be deemed just and necessary. Thus, in the light of these prayers the question as to whether the present case comes within the of Scope section 37 read with section 22 or section 39 read with section 50 of the Tamil Nadu Court-fees and Suits Valuation Act, has to be decided.

4. Section 39 (*i*) is the material provision and it states that in a suit for the adminsiration of an estate, fee shall be levied on the plaint at the rates specified in section 50, Section 50 provides that in a suit not otherwise provided for, fee shall be payable at certain graded rates depending on the forum and value.

5. As far as the suit filed before the Sub-Court is concerned, the Court fee payable would depend upon the valuation being below Rs. 5,000 or between Rs. 5,000 and Rs. 10,000 or in excess of Rs. 10,000. Section 37 also provides for almost similar fee depending on the value of the property If there were no other complication by reference to the serveral provissons to be made out of the estate, there could really be no controversy as the fixed Court fee payable under section 37 or section 39, as the case may be was the same. With reference to this aspect as to whether it is a suit for administration or partition, there is a decision reported in *Mt Amir Bi* v. *Abdul Rahim Sahib and others*[1]. That is a case where the widow of a deceased Mahomedan prayed that the extent of property of the deceased may be ascertained, that his outstanding may be realised, that his estate may be administered, that her mahar may be paid and that the residue divisible among his heirs may be divided according to their respective shares under the law. The question for consideration was whether the said suit was an administration suit or a suit for partition. Venkatasubba Rao, J., referred to an earlier bench decision of this Court in *Moideensa Rowther* v. *Md. Asim Rowther*[2] wherein the following passage occurs:

> "In the case of Mussulmans, what would be a partition suit, if the parties were Hindus, ought often to take the form of a suit for the administration of the estate of a deceased person."

Following this decision, the learned Judge held that, in the said case, the suit could be valued only as an administration suit. The learned Judge pointed out the distinction that would obtain between the cases of the heirs of a Mahomedan filing a suit and the members of a Hindu joint family filing a suit for partition. It was pointed out that the status of a member of a Hindu coparcenary gave him certain rights in the property and that the family partition was frequently unconnected with the death of any person and that in the case of persons governed by the Mitakshara, partition suits were not necessarily in respect of property of a deceased person but in the case of Mahomedans the position was considered to be different and therefore, the suit was treated as an administration suit.

6. There was an earlier decision in *Abdul Karim Sahib* v. *Badruddin Sahib*[1] in which it was held that the suit which was under consideration should be treated as a partition suit and not a suit for administration. The learned Judge (Venkatasubba Rao, J.) stated that the said decision could not be treated as settling a question of principle. It was pointed out that the said decision could not be taken as an authority for the broad proposition that the heirs of a deceased Mahomedan could never file an administration suit.

7. The Bombay High Court in *Essafally Alibhai* v. *Abdeali Gulam Hussain and others*[2] had to deal with the case of a Mohamedan who died leaving several heirs including his own parents. The parents died and their shares passed to their son who was the plaintiff in the said case. The plaintiff filed the suit for an account and administration of the estate of his deceased brother. The suit was dismissed on the ground that an administration suit did not lie and that the only suit that could lie was for partition. On appeal, the Bombay High Court held that the plaintiff had an interest in the estate of his deceased brother, that he was entitled to ask for a preliminary decree for the administration of the estate and that he was not bound to file a suit for partition.

8. In *Mahbub Alam* v, *Razia Begum and others*[3] it was pointed out by a Bench of that Court that under the Mahomedan law the distribution of the residue among the successors of a deceased person was a duty attached to the estate notwithstanding that it vested in the heirs at the time of the death of the propositus. Following the decision in *Moideensa Rowther* v. *Md. Kasim Rowthan*,[4] it was held that in the case of Mahomedans between a partition suit and an administration suit, the latter should be preferred. The same position

1. (1928) 55 M.L.J. 266: 28 L.W. 583. A.I.R 1928 Mad. 760.
2. (1915) I.L.R. 37 All. 177: (1915) 28 I.C. 896.

1. (1905) I.L.R. 28 Mad 216
2. (1921) I.L.R 45 Bom 75.
3. A.I.R. 1950 Lah. 12
4. (1915) 28 I.C 896: I.L.R. 37 All. 177.

emerges also from a Bench decision of the Gujarat High Court in *Nazarali Kazamali and others* v. *Fazianbibi and others*.[1] The scope of an administration suit was pointed out in that case thus:

> "The scope of an administration suit clearly is one to collect the assets of the deceased to pay off the debts and other legal charges, to take account of the income and expenses of the estate, and to find out what is the residue of the estate available for distribution amongst the heirs of the deceased and in what shares and distribute the same amongst the heirs of the deceased. It is only after the accounts are taken that the proper administration of the estate can be made and this is more so in the case of a deceased Mahomedan. Principles of Mahomedan Law by Mulla (7th Edn.) paras. 39 and 40".

9. Thus, the several decisions to which reference has been made above go to show that in the case of Mahomedans, the proper remedy would be a suit for administration especially in cases where the residue of the property has to be ascertained and the share of the plaintiff has to be allotted. That is the position here. The residue has to be ascertained after making the provisions prayed for.

10. The Court below has followed a decision of this Court in *Nambikkai Mary Ammal* v. *Prakasa Mary and others*.[2] That was a decision in a suit filed by persons professing the Christian religion. It has already been seen that as far as Mohamedans are concerned, the Courts have taken the view that a suit for administration is more appropriate than a suit for a mere partition. Therefore, the principle laid down in this decision *viz*, *Nambikkai Mary Ammal* v. *Prakasa Mary and others*[2] connot be applied to the facts of the case here Further that was a case where the plaintiff had been given a property with a direction that she should pay certain others a part value of the same on a particular date. The plaintiff filed the suit to work out her rights and ascertain the money payable to the others. It was held that it was not a suit for partition but a suit for carrying out the directions of the settlor and the Court-fee would have to be paid under section 39 of the Madras Court-Fees Act by all parties concerned. It is not clear how this decision supports the proposition that has commended itself to the Court below. If at all, this decision would support only the case of the plaintiff. It is, however, unnecessary to go into this aspect in view of the peculiar nature of the character of a suit in the case of Mahomedan heirs.

11. I consider that the Court fee paid is proper and that it is not necessary to value the reliefs under section 37 read with section 22 of the Tamil Nadu Court-Fees and Suits Valuation Act.

12. The result is that this civil revision petition is allowed. No costs. As the suit has been pending for a long time the Court below will take expeditious steps to dispose of the same within a period of four months from the date of the receipt of the records.

R.S. *Revision allowed.*

1. A.I.R. 1975 Guj 81.
2. (1959) 2 M.L.J. 120.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT: *T. Sathiadev, J.*

C. S Narayanaswami Iyer .. *Appellant**

v.

Narayana Sarma ... *Respondent.*

Execution Decree of trial Court set aside on appeal —Provision for costs of trial Court and appellate Court made in the appellate Court decree—Execution of the decree by one of the parties for costs—One of the appellants dead at the time of hearing of the appeal —Legal representatives not brought on record—Decree of appellate Court whether a nullity and cannot be executed.

The plaintiff sued for recovery of Rs. 14,580 from the first defendant personally and from and out of the suit properties in the hands of defendants 2 to 18 with a charge on the suit properties and costs. The lower Court decreed the suit for Rs. 13,119 and odd with interest and proportionate costs, the decretal amount being payable by defendants 2 and 5 to 18 from and out of the suit properties in their

*C.M.A. No. 299 of 1976 and C.R.P. No. 1548 of 1977. 21st *December*, 1978

hands, and the first defendant being personally liable for a sum of Rs. 125 on the ground that he had benefited only to that extent. The defendants appealed. Anterior to the disposal of the appeal by the High Court on 9th August, 1973, the 8th appellant (10th defendant) had died on 28th May, 1972 and his legal representatives, had not been brought on record. The High Court allowed the appeal ordering the plaintiff to pay the costs of the defendants. Under the High Court decree the costs payable to the respective defendants had been separately provided for. The first appellant, first defendant was awarded Rs. 1 052.50. The first defendant sought to realise his costs. The plaintiff contended in the execution proceedings that the High Court decree was a joint and indivisible one, the reliefs claimed being common, that the entire decree was a nullity inasmuch as the legal representatives of the appellant had not been brought on record and hence the entire decree could not be executed.

Held: In the trial Court, the liability of the first defendant was limited only to Rs. 125. Aggrieved by this portion of the decree, he had joined with the other defendants in appeal preferred to the High Court. Therefore merely because the first defendant had joined with the other defendants in the appeal, it cannot be inferred that the decree is a joint and indivisible one. The contention that but for the liability of the first defendant, the other defendants will not be within the scope of the suit, cannot be a ground to treat the decree as drafted as a joint decree. If no appeal had been filed in the High Court the only relief which the plaintiff could have had was to demand payment of Rs. 125 by the first defendant and nothing else Regarding the rest of the decree, the plaintiff had to confine himself only against the other defendants mentioned in the decree. But when the Court passes a decree in a specific manner there is no question of construing it as anything different from what it unambiguously provides and the judgment cannot be looked into to vary the decree because nothing prevented the plaintiff to ask for the amendment of the decree. This is not a case where the concept of general and indivisible decree will be applicable. Even though the 8th appellant died before the passing of the decree by the High Court the decree of the High Court has not become a nullity for the failure to bring on record the legal representatives of the 8th appellant. [*Para* 3.]

Cases referred to:

Sunderdass v. *Ram Prakash*, (1977) 2 S C.C 662: (1977) 2 S.CJ. 98: (1977) 3 S.C.R 60: A.I.R. 1977 S.C 1201; *Hiralal Patni* v. *Sri Kali Nath*, (1961) 2 S.C.J. 592: (1961) 2 M.L.J. (S.C.) 157: (1961) 2 An. W.R. (S.C.) 157: (1962) 2 S.C R. 747: A.I R. 1962 S.C. 199; *State of Punjab* v. *Nathu Ram*, (1961) 2 S.C.J. 637: (1961) 2 M.L J. (S.C.) 182: (1961) 2 An. W.R. (S C.) 182: (1962) 2 S.C.R 636: A I.R. 1962 S.C 89; *Rameshwar* v *S.B. Jagannath*, (1964) 3 S C R. 549: (1965) 1 S.C J. 114: A.I.R. 1963 S.C. 1901; *R.P. Gupta* v. *Murli Prasad*, (1973) 1 S.C.J. 129: (1973) 2 S.C.C. 9: (1973) 1 S.C.R. 63 A I.R. 1972 S.C 1181; *Muthuswamy* v. *Venugopalan*, (1973) 1 M L.J. 351: 86 L.W. 105: A.I R. 1973 Mad 339.

K. Raman, for Appellant.

V. Ratnam and *K. Srinivasan*, for Respondent.

The Court delivered the following

JUDGMENT.—C.M.A. No 299 of 1976 is filed against an order made in E. A. No 368 of 1975 which was filed to transfer the decree for collecting the trial Court's costs from the plaintiff by the first defendant as provided in A.S. No. 443 of 1967 of the High Court, Madras. This application was ordered on the ground that the decree can be executed even though at the time when the decree was passed by the High Court, the 8th appellant who was the 10th defendant in the suit had died on 28th May, 1972 which was anterior to the disposal of the appeal an 9th August, 1973 and the legal representatives of the 8th appellant hat not been brought on record. The counsel for the appellant contends that the decree made in A.S. No. 443 of 1967 which was filed against O.S. No. 95 of 1965 was a joint and indivisible decree and the reliefs decreed being common, since the legal representatives of the 8th appellant had not been brought on record in time, the entire decree is a nullity and it is open to the appellant herein to plead in the execution proceedings that the decree is inexecutable. On the materials placed before the Court below, it is established that the 8th appellant died on 28th May, 1972, and this fact was not brought to the notice of the High Court when A.S No. 443 of 1967 was taken up for hearing and disposed of on 9th August, 1973. The appeal was allowed and it was ordered therein that the plaintiff is liable to pay the costs of the defendants. The contention is that when the entire decree cannot be executed, there can be no question of realisation of

costs by the first defendant alone, even though in the decree made by the High Court, the costs payable to the respective defendants had been separately provided for. In support of the contention that even in Executing Court, it is open to a party to plead about nullity of a decree, he relies upon the decision in *Sunderdass* v. *Ram Prakash*[1] and *Hiralal Panti* v. *Sri Kali Nath*.[2] In the last of these decisions, it has been held that the executing Court can go into the question of finding out whether the decree had been passed by Court without jurisdication which may be pecuniary or territorial or in respect of the subject-matter, which would strike at the very authority of the Court to pass the decree But the decision entered in *Sunderdass* v. *Ram Prakash*[1] is to the effect that an executing Court cannot go beyond the decree, nor can it question it's legality or correctness, but there is one exception to this general rule which would be on the ground that the Court had no inherent jurisdiction to pass the decree. Hence before the executing Court it can be shown that the decree was a nullity and therefore it cannot be executed. In this case, 8th appeallant was dead at the time when the decree was passed by the High Court and therefore it is contended that the decree passed as against a dead person will be a nullity and it being a general and indivisible one, it cannot be executed even as against the first defendant. Hence the next aspect to be considesed is whether the decree that has been passed is a joint and indivisible one. For this, counsel for the appellant refers to the decision in *The State of Punjab* v. *Nathu Ram*[3] wherein it has been held that when a decree is a joint and indivisible one, it will have to be dismissed if the appeal had become abated as against one of the parties and the legal representatives have not been brought on record in time. In the absence of one joint-decreeholder, the appeal is not properly framed, and hence as against the surviving decree holders, it cannot be proceeded with. Thereafter he refers to the decision in *Rameshwar* v. *S.B. Jagannath*[4] wherein also it has been held

1. (1977) 2 S.C.C. 662: (1977) 2 S.C.J. 98: (1977) 3 S.C.R. 60: A.I.R. 1977 S.C. 1201.

2. (1961) 2 S.C.J. 592: (1961) 2 M.L.J. (S.C.) 157: (1961) 2 An W.R. (S.C.) 157: (1961) 2 S.C.R. 747: A.I.R. 1962 S.C 199.

3 (1961 2 S.C.J. 637: (1961) 2 M.L.J. (S.C.) 182: (1961) 2 An W.R. (S.C.) 182: (1962) 2 S.C.R. 636: A.I.R. 1962 S.C. 89.

4. (1964) 3 S.C.R. 549: (1965) 1 S.C.J. 114: A.I.R. 1963 S.C. 1901.

that if pending an appeal, one of the appellants dies and the legal representatives have not been brought on record the surviving appellants cannot be said to have filed the appeal as representing the deceased appellant and therefore the appeal of the deceased appellant abates and does not proceed any further. Reference is also made to the decision in *R.P. Gupta* v. *Murli Prasad*[1] which deals with a case of partnership wherein it has been held that the Court's will not proceed with an appeal when the success of the appeal may lead to the Court's coming to a decision which may be in coflict with the decision between the appellant and the decased-respondent, and therefore it would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent and hence the decree against the surviving respondent will become ineffective, due to the legal representatives not being brought on record within the period of limitation in respect of one of the dead parties. In *Muthuswamy* v *Venugopalan*,[2] the propositions laid down in the decisions above referred to had been followed. Hence, if it be shown that the decree which is now sought to be proceeded against the plaintiff is a joint and indivisible one then, the appellant will be entitled to the relief he has asked for. O.S. No. 95 of 1965 was filed by the appellant herein for recovery of a sum of Rs. 14,580 from the first defendant personally and from and out of the suit properties in the hands of defendants 2 to 18 with a charge on the said properties and for costs. The suit was decreed for a sum of Rs. 13,119.19 with interest and proportionate costs payable by defendants 2 and 5 to 18 from and out of the suit properties in their hands and the first defendant was made personally liable to a sum of Rs. 125. Counsel for the appellant refers to the finding given in that judgment to show that but for the liability of the defendant there can be no question of passing any decree as against other defendants who are all alienees and charge being created in respect of the properties conveyed in their favour.

2. The trial Court has passed a decree so far as the first defendant is concerned under issue

1. (1973) 1 S.C.J. 129: (1973) 2 S.C.C. 9: (1973) 1 S.C.R. 63: A.I.R. 1972 S.C. 1181.

2. (1973) 1 M.L.J 351: 86 L.W. 105: A.I.R. 1973 Mad. 339.

No. 11 to the extent of only Rs. 125 on the ground that only to that extent he has been benefited. But in respect of the other amounts, it had not passed any decree, as against the first defendant. Even though the counsel for the appellant refers to the other fiindings in this judgment on issue Nos. 5 and 8, in the context of this Court in A.S. No. 443 of 1967, setting aside the judgment of the trial Court, it cannot be of much assistance to the counsel for the appellant to rely on those findings and try to show that the decree that was passed by the trial Court was in effect only against the first defendant and not against others and it was a joint and indivisible decree. The reference made by the counsel to the memo. of grounds filed in that appeal in the High Court wherein in ground No. 38, it has been stated that the Court below was wrong in passing a joint decree for the entire amount due to the plaintiff from the first defendant and that the first defendant was also one of the parties in that appeal, and therefore it is clear that the suit claim was a joint and indivisible one whatever be the manner in which the decree had been drafted, cannot be of any assistance to the appellant. Counsel for the respondent contends that to find out whether a particular decree is joint and indivisible one has to look into the nature of the claim, the prayer in the plaint, the actual manner in which the decree had been passed and any reference to be made to the judgment can be only for understanding the decree and when the decree provides for a specific liability, there can be no question of trying to find out the nature of rights claimed in the suit by referring to the judgment fot coming to a different conclusion. Regarding the ground No. 38 in the memo. of grounds filed in A.S. No. 443 of 1967 he contends that it cannot have any binding effect in the fact of what is clearly provided in the decree itself. Lastly he contends that the High Court decree had provided for different amounts to be collected by the respective defendants and even the trial Court had passed a decree only for a sum of Rs. 125 as against the first defendant and therefore there is no question of a joint and several decree being passed in this matter and the contention that the decree of the High Court is a nullity cannot be accepted.

3. I have already referred to the fact that the judgment of the trial Court had been set aside and the High Court has passed a decree stating as follows:

> "The plaintiff-first respondent-herein do pay the first appellant-first defendant the sum of Rs. 1,052·50 (Rupees One thousandand fifty two and fifty paise) being the costs in the trial Court".

It is for this amount the present execution has been taken out. Paragraph 3 deals with the costs payable to the second defendant, and paragraph 4 refers to the costs payable to defendants 5 to 14 and 16 and 17 in the trial Court. Paragraph 5 deals with costs payable in the appeal by defendants, 1, 2, 5 to 14 and 16 to 18. Therefore, the High Court has made separate calculation of the costs payable by the plaintiff to the respective defendants. In the trial Court, the liability of the first defendant was limited only to Rs.125. Aggrieved by this portion of the decree, he had joined with other defendants in the appeal preferred to the High Court and ground No.42 refers to the same. Therefore, merely because the first defendant had joined with other defendants in the appeal, it cannot be inferred that the decreeis a joint and indivisible one. The contention that but for the liability of the first defendant, other defendants will not be within the scope of the suit, cannot be a ground to treat the decree as drafted as a joint decree. As contended by the counsel for the respondent, if no appeal had been filed in the High Court, the only relief which the plaintiff could have had was to demand payment of Rs. 125 by the first defendant and nothing more. Regarding the rest of the decree, the plaintiff had to confine himself only against the other defendants mentioned in the decree, and nothing more than Rs. 125 can be recovered from the first defendant. No doubt counsel for the appellant contends that this was an uufortunate omission in the decree of the trial Court. But when the Court passes a decree, in a specific manner there is no question of construing it is anything different from what it unambigously provides and the judgment cannot be looked into to vary the decree because nothing prevented the plaintiff to ask for the amendment of of the decree. He had not done it. Therefore even in the judgment of the trial Court, in paragraph 25 under issue No. 11 it has been held that the first defendant was benefited only to the extent of Rs. 125 and therefore only to that extent, the decree had been passed

seperately as against him. But on appeal it has been set aside and the High Court has directed that the plaintiff is liable to pay the costs of the first defendant in the trial Court for a specific amount. I have already referred to the manner in which the decree has been made out for different defendants and that being so, this is not a case where the concept of general and indivisible decree will be applicable. Hence, eventhough the 8th appellant died before the passing of the decree by the High Court, the decree in A.S.No. 445 of 1967, has not become a nullity for the faliure to bring on record the legal representatives of the 8th appellant, so far as the first defendant is concerned and the High Court has fastened a liablity on the plaintiff to pay first defendant's costs in the trial Court by specifying the amount payable by the plaintiff. Hence, the proceedings now taken for realising that amount from the plaintiff is valid. Hence the C.M.A. and C.R.P. are dismissed. No costs.

R.S. *Appeal and revision dimissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRASENT:— *S.Nainarsundaram, J.*

Hajia Aiysha Nachiar Kalvi Arakkattalai, Nagore by its Trustee Hajia S.M.I Aylsha Nachiar, Nagore ... *Petitioner**

v.

State of Tamil Nadu represenned by Collector of Thanjavur. ... *Respondent.*

(A) *Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), section 2 (1) (ii)—"Religious trust of a public nature"—Test.*

(B) *Wakf Act (XXIX of 1954), section 3 (1) Wakf—Definition in Mohammedan Law.*

(C) *Deeds—Constructions—Religious trust of a public nature.*

It is not possible to import straightaway the conception of a 'trust' as understood in the ordinary legal parlance, for the purpose of application of the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act to the facts of the instant case. The Act has set out special definitons in respect of various categories of trust. Only when there is lack of a specific definiton, one will be compelled to look to the impact and implications of an expression used, as normally understood, in the general branch of law.

[*Para.* 2.]

To bring the matter within the ambit of 'religious trust of a public nature' the dedication of property must be for religious purposes. The link between the practice of religion and the utilisation of the property must be evident. The utilisation of the income from the property must be for the purpose of the religion in question or otherwise for religious purposes. If the purpose is merely charitable, it would be very difficult to bring the dedication as one for religious purpose. The distinction is subtle but, however, it is important because the provisions of the Act require that for a trust to claim total exemption from its provisions, it must be a religious trust of a public nature. May be, there could be cases where the trust could be both religious as well as charitable. Such a contingency has been contemplated and provided for under section 2 (3) of the Act (LVIII of 1961) when it says that a public trust could be both for a public purpose of religious nature and for any other public purpose, but, the presence of a religious purpose-may be along whith other purpose— is a condition precedent so as to attract the'total exeemption under section 2 (1) (*ii*) of the Act. [*Para.* 2.]

Held, that in the present case, the objects could not be characterised to be religious and there was no link between the objects of the trust and any tenets of the Mohammedan religion.

Cases referred to:—

Nawab Jain Yar jung v. *The Director of Endowments*, (1963) 1 S.C.R. 469: (1964) 1 S.C.J. 285: (1964) 1 M.L.J. (S.C.) 84: (1964) 1 An. W.R. (S.C.) 84: A.I.R. 1963 S.C. 985; *Sattar Ismail* v. *Hamidd Sait* I.L.R. (1945) Mad. 276: (1944) 2 M.L.J. 92: A.I.R. 1944 Mad. 504, *Bai Hirbai and Kesarbai charitable Religious Trust* v. *Commissioner of Income-tax* (1968) 68 I.T.R. 821; *Narayana Ayyangar* v. *Commissioner* H.R. & C.E. Madras (1961) 74 L.W. 140: I.L.R. (1961) Mad. 656: (1961) 1 M.L.J. 198: A.I.R. 1961 Mad. 258.

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* C.R.P. No. 1314 of 1976. 14*th December*, 1978.

Petition under section 83 of the Tamil Nadu Land Reforms Act LVIII of 1961, (Fixation of Ceiling on Land) Act, 1961 as amended by Act XVII of 1970 praying the High Court to revise the order of the Court of the Land Tribunal at Nagapattinam dated 4th September, 1976 and made in C.M.A. (L.T) No. 35 of 1976 (A. M.R.I. Case No 6H/Trust/NGT/A3 on the file of the Authorised Officer, Nagapattinam).

R.G Rajan, *N. Muthuswamy* and *Chellamuthu Rengarajan*, for Petitioner.

The Additional Government order Pleader, for Respondent.

The Court made the following

ORDER.—The revision petitioner is Hajia Ayisha Nachiar Kalvi Arakkattalai, Nagore, by its Trustee Hajia S.M.I. Ayisha Nachiar, Nagore. Proceedings under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, Act LVIII of 1961, hereinafter referred to as the Act, were initiated by the Authorised Officer (Land Reforms), Nagapattinam, against Tmt. Hajia S.M.I Ayisha Nachiar. It has been found that she gave away an extent of 10.50 standard acres of lands to the petitioner Trust. Since the Trust by itself could come within the definition of 'person' under section 3 (34) of the Act, the holdings of the Trustees themselves were subject to separate assessment under the provisions of the Act. The Authorised Officer countenanced an exclusion under section 3 (22) of the Act of an extent of 0. 67 standard acres and held that the net holdings of the Trust came to 9.83 standard acres. The Trustee put forth a contention that the Trust is of a nature which would come within the definition of a 'religious trust of public nature within the meaning of section 2 (1) (*ii*) of the Act and hence the provisions of the Act would not apply to the lands held by the petitioner Trust. The Authorised Officer, on a consideration of the deed of trust marked in the case as Exhibit P-1 dated 31st December, 1969 and the evidence of one A.H. Shaik Mohammed, who is the son of the Trustee's sister examined as P.W.1, came to the conclusion that the Trust is a public trust of a charitable nature within the meaning of section 5 (1) (*d*) (*i*) of the Act and held that the petitioner Trust is eligible to retain only 5 standard acres and the balance of 4.83 standard acres was declared as surplus. The petitioner Trust preferred an appeal, C.M.A (L.T) No 35 of 1976, which was heard and disposed of by the Land Tribunal at Nagapattinam, and the Land Tribunal also, on an analysis of the recitals in the deed of trust, came to the conclusion that there is nothing religious in the Trust in question and it could only be held to be a public trust of a charitable nature and in this view, confirmed the order of the Authorised Officer. The present revision is directed against the Orders of the Land Tribunal.

2. Mr. R.G. Rajan, learned counsel for the petitioner, would urge that there is a misconception in the minds of the forums below with regard to the proper construction of the recitals in the deed of trust According to the learned counsel, a proper construction of the recitals in the deed of trust in the light of certain principles of the Mohammedan Law would compel the Court to uphold the contention of the revision petitioner that the Trust in question is a 'religious trust of a public nature' within the meanieg of Section 2 (1) (ii) of the Act. To appreciate the contention of the learned counsel for the petitioner, it is necessary to extract hereunder the relevant recitals in the deed of trust.

''*தக்க கல்வி நிறுவனங்களுக்கு நிதிவசதியும் இதர உதவிகள் வழங்குவதும் அவைகளை செவ்வனே செயல்படச் செய்தலும் கல்லூரிகள் தொழில் நுட்பக் கலைக் கூடங்கள் தமிழ், இயல், இசை. நாடக, நாட்டிய கலைகளை வளர்த்தல், பேணுதல், திக்கற்ற முஸ்லீம் மாணவர்களுக்கு கல்வி வசதிகள் அளித்தலும் விடுதிகள் அமைத்துக் கொடுத்தும் நடத்தி வருதலும், ஏழை முஸ்லீம் மாணவ மாணவிகளுக்கு கல்விக்காக* Scholarships stioends Prizes *அளித்து ஊக்கமளித்தலும், இன்னும், இன்ன பிற கல்வி வளர்ச்சிக்கான பணிகளில் ஈடுபடுதலும் இந்த அறக் கட்டளையின் பணிகளும் நோக்கங்களுமாகும்.*'' It is not posible to import straightaway the conception of a 'trust' as understood in the ordinary legal parlance, for the purpose of application of the provisions of the Act to the fact of this case. The Act has set out special definitions in respect of various categaries of Trust. Only when there is lack of a specific definition, we will be compelled to look to the import and implication of an expression used, as normally understood, in the general branch of law. Section 2 under which the petitioner seeks a total exemption reads as follows:

"2. Act not to apply to lands held by existing religious institution or religious trust

of public nature.—(1) Subject to the provisions of sub-sections (2) and (3) of section 6, nothing contained in this Act shall apply to lands held,—

(*i*) by any religious institution, or

(*ii*) by any religious trust of a public nature, which is in existence on the date of the commencement of this Act.

(2) Notwithstanding anything contained in rub-section (1), no such religious institution or religious trust of a public nature as is referred to in sub-section (1) shall acquire by any means whatsoever any land after the date of the the commencement of this Act.

(3) Notwithstanding anything contained in this Act, for purposes of this section—

(*a*) where a public trust in existence on the date of the commencement of the this Act, has been created both for a public purpose of a religous nature and for any other public purpose; or

(*b*) where the income frome a public trust in existence on the date of the commencement of this Act is appropriated both for a public purpose of a religios nature and for any other public purpose, such public rrust shall be deemed to be a religious trust of a public nature."

Section 3 (34) deftnes a 'person' as follows:

"(34) 'person, includes any company, family, fiirm, society or association of individuals, whether incorporated or not; or any private trust or public trust;"

'Private trust' has been defined under section 3 (36-A) of the Act and the definition runs as follows:

"(36-A) 'private trust' includes a trust under which the beneficiaries are persons who are ascertainad or capable of being ascertained".

Section 3 (36-AAA) defines 'public trust' as follows:

"(36-AAA) 'public trust' means a trust for a public purpose of religious, charitable or of an educational nature;"

"Religious Institution" is defined by section 3 (36-B) in the following terms:

"(36-B) 'religious institution' means any

(*i*) temple:

(*ii*) math;

(*iii*) mark; or

(*iv*) church;

which is dedicated to, or for the benefit of, or used as of right by, the public as a place of religious worship;"

In the case of a 'public trust' of a charitable natures the provision to be applied is found under section 5 (1) (d) (i) of the Act and it runs as follows:

"(*d*) (i) The ceiling area in the case of a public trust of a charitable nature in existence at the date of the commencement of this Act (other than such trusts under which the institutions referred to in clause (*c*) (i) or the beneficiaries) shall be (five) standard acres:

Provided that such extent of land is held by such trust on the date of the commencement of this Act. '

Unless the petitioner makes out a case that the Trust in question is a religious trust of a public nature within the meaning of section 2 (1) (*ii*), there is no dispute that the assessment of the ceiling area has got to be done, as it has been done, by the formulas, below, uuder section 5 (1) (*d*) (*i*) of the Act.

3. Mr. R.G. Rajan, learned counsel for the petitioner, wants to derive support from the definition of 'wakf' under section 3 (1) of the Wakf Act (Act XXXI of 1954), which runs as follows:

"(1) 'wakf' means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes—

RELIGIOUS

(*i*) a wakf by user;

(*ii*) grants (including mashrut-ul-khidmat) for any purpose recognised by the Mnslim law as pious, religious, or charitable; and

(*iii*) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable.

and 'wakf' means any person making such dedication". In my view, this could not

be of much help to the petitioner for the simple reason, apart from using the expression 'religious', it does not further elucidate as to the import and implication of the expression 'religious' and we have to fall back upon the conceptions of Mohammedan law and other branches of law about 'religious purpose of a trust'. Learned counsel draws my attention to the following passage found in *Nawab Zain Yar Jung* v. *The Director of Endowments*[1].

> "Similarly, the Muslim law relating to trusts differs fundamentally from the English law. According to Mr. Ameer Ali, "the Mohammedan Law of wakfs owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings". As a result of the creation of a wakf, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. But in that capacity, he has no right in the property belonging to the wakf; the property is not vested in him and he is not a trustee in the legal sense. Therefore there is no doubt that the wakf to which the Act applies is, in essential features, different from the trust as is known to English law."

This again does not throw much light on the question as to when a trust is to be treated as 'religious', for the extract made above is more on the question as to the creation of a wakf. To bring the matter within the ambit of 'religious trust of a public nature', the dedication of the property must be for religious purposes. The link between the practice of religion and the utilisation of the property must be evident. The utilisation of the income from the property must be for the practice of the religion in question or otherwise for religious purposes. If the purpose is merely charitable, it would be very difficult to bring the dedication as one for religious purpose. The distinction is subtle but, however, it is portent because the provisions of the Act require that for a trust to claim total exemption from the provisions of the Act, it must be a religious trust of a public nature. May be, there could be cases where the trust could be both religious as well as charitable. Such a contingency has been contemplated and provided for under section 2 (3) of the Act, when it says that the public trust could be both for a public purpose of a religious nature and for any other public purpose. But, the presence of a religious purpose—may be along with other purposes, is a condition precedent so as to attract the total exemption under section 2 (1) (ii) of the Act. The recitals extracted above, in my view, do not make out that the objects of the trust are 'religious' in character. There is no doubt, and there is no dispute before me. that the trust in question is a public trust, because it is intended to serve a section of the public. It speaks about rendering financial and other assistance to educational institutions, proper administration of the same, promotion of Tamil, artistic and cultural activities, colleges and technical institutions, rendition of help to destitute Muslim students for educational purposes, establishment and running homes for them, giving of scholarships, stipends and prizes to poor Muslim boys and girls for education and discharging other ancillary purposes. It is impossible to spell out that the aforesaid objects are 'religious' in character. Learned counsel appearing for the petitioner has not brought to my notice any decision of any High Court or of Supreme Court which has recognised purposes similar to the above as religious purposes. In *Sattar Ismail* v. *Hamid Sait*[1] this Court considered the reading of Koran over the tomb of the founder as religious and pious. In *Bai Hirbai and Kesarbai Charitable and Religious Trust* v. *Commissioner of Income-tax*[2] the High Court of Bombay held that the reading of the Holy Koran is not only a religious and pious act, but it would constitute a valid purpose of a religious endowment.

4. The above decisions have been followed by Ramanujam, J., in *A.K. Vavalevvai Maricair Dharmam* v. *The State of Tamil Nadu*.[3] The learned Judge was concerned with a case where the object of the trust was to run a *madarasa* wherein Muslim girls and boys are given religious lectures and lessons in Koran and the learned Judge held that the recitals indicate that religious instructions and lessons

1. (1963) 1 S.C.R. 469 at 479, 480: (1964) I S C J. 285; (1964) 1 M.L.J. (S.C.) 84: (1964) 1 An. W.R. (S.C.) 84: A.I.R. 1963 S.C. 985.

1. I.L.R. (1945) Mad. 276: (1944) 2 M.L.J. 92: A.I.R. 1944 Mad. 504.

2. (1968) 68 I.T.R. 821.

3. C.R.P. No. 1628 of 1976, dated 1st November 1978.

in Koran and also lectures on principles of Islamic religion are given in the *madarasa* for the benefit of Muslim girls and boys and it would come within the purview of section 2 (1) (*ii*) of the Act so as to claim total exemption from the provisions of the Act. In *State of Tamil Nadu* v. *Annachatram Trust, Thanjavur*[1] Ismail, J., found on the facts of the case that the intention of the author of the trust was to perform charities on certain occasions and days considered to be sacred or beneficial religiously and hence, the trust in question in that case comes within the meaning of a 'religious trust of a public nature.'

5. In *Narayana Ayyangar* v. *Commr., H.R. & C.E., Madras*[2] a Division Bench of this Court was concerned about the definition of a 'religious charity' within the meaning of section 6 (13) of the Madras Hindu Religious and Charitable Endowments Act XIX of 1951, which read as follows:

> "Religious charity means a public charity associated with a Hindu festival or observance of a religious character, whether it be connected with math or temple or not."

The object of the trust was to conduct feeding, charity to the members of the Brahmin community from out of the income of the properties belonging to the trust and it was being performed for some years on the day of the Car Festival of the deity of a particular temple; and in later years, the feeding was being done on all the ten days of the festival but on no other day in the year. The trustees were the founders of the trust and after them their heirs, who managed it as hereditary trustees, and conducted the feeding charity. The trustees of the shrine conducting the festival had no manner of check, control or supervision over the feeding charity. The Rathothsavam festival and the feeding charity have nothing to do with each other. On the question as to whether this *Samarathanai kattalai* is a religious charity as defined under section 6 (13) of Madras Act XIX of 1951, the learned Judges of the Division Bench held that the mere fact that the founders of the feeding charity thought that it will be meritorious to feed Brahmins on an important festival occasion which is a sacred occasion cannot establish any link or connection between the occasion and the charity itself and as there was no unity of purpose or a common object or a common endeavour between the festival and the charity, there is no association between the two within the language of the enactment. I am obliged to refer to the dictum of the above decision to stress upon the importance of the existence of the link between the object of the trust and the practice of the religion in question according to its tenets. In the present case, the objects cannot be characterised to be religious and there is no link between the objects of the trust and any tenets of the Mohommedan religion.

6. In this view, I am not able to appreciate and accept the submissions made by the learned counsel for the petitioner and I find no error, either of law or of jurisdiction, committed by the forums below so as to compel this Court to interfere in revision. Accordingly this revision is dismissed. There will be no order as to costs.

R.S. —— *Petition dismissed.*

1. C.R.P. No. 3139 of 1977, dated 1st March, 1978.

2. (1961) 74 L.W. 140: I.L.R. (1961) Mad 656 (1961) 1 M.L.J. 198: A.I.R. 1961 Mad 258.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: *V. Balasubrahmanyan, J.*

Karuppa Kudumban .. *Appellant.**

v.

Arokiam Servai. .. *Respondent.*

(A) *Suit for specific performance—Agreement to reconvey an item of property—Suit by assignee of original vendor—Claim for mesne profits also made in suit—Specific performance and mesne profits decreed by lower appellate Court—Legality of award of mesne profits.*

(B) *Civil Procedure Code (V of 1908), Order 20 Rule 12—Award of mesne profits set aside.*

The question of mesne profits will ordinarily arise for consideration only in a case where a party who is entitled to possession of property is prevented from enjoying the usufruct or the rents and profits therefrom and the party against whom the relief is claimed had no lawful right to possession and enjoyment of the property for the duration. The question of mesne profits can seldom arise in a suit for specific performance. In this kind of suit the plaintiff does not sue for title, much less for

*S.A. No. 2475 of 1974. . 14th July, 1978.

possession. All he asks for is the assistance of the Court and its coercive process to acquire title, which he had failed to acquire by other means. Besides, this title which he devoutly wishes for in the suit, he can only acquire when the conveyance is effected and is duly registered and not before, not even when the Court grants the decree. During all this period, the defendant in possession of the property might be regarded by the plaintiff as not quite justified in doing so. But the defendant's possession on that account, is by no means unlawful, for he has undoubted title to the property and he retains that title till so long as conveyance is effected pursuant to the decree for specific performance. In these events, there can be no question of the defendant beidg asked to account for any 'mesne profits' as respects the subject-matter of the suit. [*Para.* 4.]

Order 20, Rule 12, Civil Procedure Code in terms refers to a suit for recovery of possession of immovable property and for rent or for mesne profits. The implication is that it is only in such a suit that the Court will have iurisdiction to pass a decree for mesne profits. Not in any kind of suit. At all events, it would be incongruous to direct mesne profits in a suit for specific performonce. [*Para.* 5.]

Appeal against the decree of the Subordinate Judge, Dindigul in A. P. No. 210 of 1971, preferred against the decree of the Court of the Additional District Munsif, Dindigul in O S. No. 249 of 1968.

R G Rajan, G. Gopalaswami; R. Kannan and *G. Nagarajan*, for Appellant.

V C. Veeraraghavan, for Respondent.

The Court delivered the following

JUDGMENT:—This second appeal arises out of a suit for specific performance of an agreement to reconvey an item of immoveable property. The suit was filed by an assignee from the original vendor. The defendant who had bound himself to reconvey the property resisted this suit. He said that the agreement of reconveyance was not assignable. He put for ward other defences too. The trial Court upheld these defences and dismissed the suit. On appeal, the Sub-Court reversed this decision and decreed the suit in the plaintiff's favour.

2. The defendant has now brought this second appeal against the appellate decree, The argument of his counsel, Mr. R.G. Rajan, was however directed not so much against the decree passed by the appellate Court for specific performance, as such, but against another part of the decree to which I must now refer. It appears from the record that before the trial Court the plaintiff had also prayed for mesne profits to be directed to be paid by the defendant. The trial Court while dismissing the suit for specific performance naturally rejected this prayer for mesne profits too. The Sub-Court, however, entertained this plea and while decreeing the suit for specific performance and directing the defendant to execute a reconveyance, further directed an inquiry into mesne profits under Order 20, rule 12 of the Code of Civil Procedure.

3. Mr. Rajan's submission in this appeal is that this part of the Sub-Court's decision is wholly misconceived. He said that this is not a case in which mesne profits could be directed to be paid by the defendant. He said that snch a direction is oppossed to the very idea of 'mesne profits' as understood in our system of law.

4. These submissions, in my opinion, are well founded. The question of mesne profits will ordinarily arise for considerations only in a case where a party who is entitled to possession of property is prevented from enjoying the usnfruct or the rents and profits therefrom and the party against whom the relief is claimed had no lawful right to possession and enjoyment of the property for the duration. The question of mesne profits can seldom arise in a suit for specific performance. For in this kind of suit, the plaintiff does not sue for title, much less for possession. All he asks for is the assistance of the Court and its coercive process to acquire title, which he had failed to acquire by other means. Besides, this title which he devoutly wishes for in the suit, hecan only acquire when the conveyance is effected and is duly registered, and not before, not even when the Court grants the decree. During all this period, the defendant in possession of the property might be regarded by the plaintiff as not quite justified in doing so. But the defendant's possession on that account is by no means unlawful, for he has undoubted title to the property and he retains that title till so long as conveyance is effected pursuant to the decree for specific performance. In these events, there can be no question of the defendant

being asked to account for any 'mesne profits' as respects the subject-matter of the suit.

5. The learned Subordinate Judge had directed the inquiry into mesne profits under Order 20, Rule 12 of the Code of Civil Procedure. But this provision is quite in-appropriate. For it in terms refers to a suit for recovery of possesien of immoveable property and for rent or for mesne profits. The implication is that it is only in such a suit that the Court will have jurisdiction to pass a decree for mesne profits. Not in any and every kind of suit. At all events, as I have already shown, it would be incongruous to direct mesne profits in a suit for specife performance.

6. Mr. V.C. Veeraraghavan, appearing for the plaintiff, however sought to put his client's case under a different equitable garb. He said that as long ago as 6th January, 1968 his client, the plaintiff, had deposited in Court Rs. 1,490 which represented the whole of the purchase consideration. This amount, he said, had remained locked up in Court deposit when all the while the difendant had been fighting the case and had remained merrily in posion of the same property. Mr. Veeraraghavan pleaded that even if, strictly speaking, the plaintiff was not entitled to mesne profits from the suit property, it would be for consideration whether he is not entitled to some kind of recompense for the loss of interest to the money in Court deposit for a period of ten long years and more.

7. I am unable to accept this plea. It is true that the plaintiff has sacrificed liquidity by depositing Rs. 1,490 inte Court. But he did so voluntarily and not under any order of the Court. It is quite probable that he meant it as a gesture, just to impress the Court about his earnestness and readiness to fulfil his Part of the contract of reconveyance. I guess he might have obtained, had he wished, an order from the Court to get the money in deposit suitably invested so as to avoid or reduce loss of interest. But he did not do so. In these circumstances. I do not think the defendant can be mulcted with payment of any interest for the period during which the money was in Court deposit.

8. In the result, I not only set aside the Sub-Court's determination on the question of mesne profits and its direction for an inquiry into quantum, but also reject the plaintiff's request for directing the defendant to pay interest on the amount in Court deposit. I make it clear that the Sub-Courts decree in other respects will stand. For I did not hear any argument from Mr. Rajan to show in what way the decree for specific performance passed by the Sub-Court was erroneous in point of law.

9. The second appeal is thus allowed in part. There will be no order as to costs.

R.S. —— *Appeal allowed in part*

IN THE HIGH COURT OF JUDICATUE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

G.K. Jose and others .. *Petitioners.**

v.

Ramathal .. *Respondent*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 10 (2) (i) and 14 (1) (b)—Eviction—Petition for—Wilful default—Tenant tendering rent—Refusal by landlady to receive—Tenant should deposit the rent either in Bank or before the Rent Controller—Failure to do so making him liable for wilful default—Demolition and reconstruction —Plan obtained by landlady after filing of the eviction petition—Requirement bona-fide.

A landlady filed an eviction petition both on the ground of wilful default in the payment of rent and for demolition and recontruction. The tenants pleaded that they tendered the rent to the landlady but it was refused and accordingly they could not be charged with wilful default. However the Appellate Authority found that the default committed by the teanants was wilful in that even if the landlady had refused to receive the rent, they should have deposited the amount in a bank or before the Rent Controller, which they did not do, and once they failed to remit the rent after knowing the consequences of non-payment, the defult should be taken to be wilful. The tenants pleaded that the landlady obtained a plan for reconstruction only after the filing of the petition and so the ground of demolition and reconstruction was not *bona fide*. On revision by the tenants before High Court,

*C.R.P. Nos. 118 and 136 to 138 of 1979.

16th January, 1979.

Held: On the question of wilful default, the decision of the Appellate Authority was not erroneous. [*Para.* 2.]

The Court could not make out how the obtaining of a plan subsequent to the filing of the eviction petition would show that the requirement of the premises by the landlady for the purpose of demolition and reconstruction was not *bona fide*. On the finding of the Appellate Authority which was based on the materials on record it was not possible to say that the requirement of the respondent (landlady) was not *bona fide* at all. The Court accepted the findings of the authorities below that the landlady required the premises *bona fide* for demolition and reconstruction. [*Para.* 3.]

Petitions under section 25 of the Tamil Nadu Buildings (Lease and Rent Control Act) XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Principal Subordinate Judge, Coimbatore, dated 10th October 1978, and made in R.C.A. Nos. 79, 77, 78 and 66 of 1978. (R.C.O.P. Nos. 465, 455, 457 and 463 of 1976, House Rent Controller and Principal District Munsif, Coimbatore).

K.M. Santhanagopalan, for Petitioners.

The Court delivered the following

JUDGMENT:—All these four revision petitions arise out of a common judgment rendered by the appellate authority under the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 dismissing the appeals filed by the four petitioners against the orders of eviction passed against at them by the Rent Controller. All the four petitioners herein are tenants in the various portions of the same building bearing different door numbers (Door Nos. 22/315, 313, 314 and 315). As regards all the petitioners except the petitioner in C.R.P. 136/79 the two grounds urged for the purpose of eviction are (1) wilful default in payment of rent; and (2) *bona fide* requirement of the premises for the purpose of demolition and reconstruction As regards the petitioner in C.R.P No. 136/79 an additional ground of eviction has been urged by the respondent-landlady. The Rent Controller by a common judgment in all the four petitions filed against the petitioners herein held that the ground of wilful default in payment of arrears of rent had been established, except in respect of the petitioner in C.R.P. No. 138 of 1979. As regards the ground of *bona fide* requirement of the premises for the purpose of demolition and reconstruction the Rent Controller held that the requirement is *bona fide* and, therefore, she is entitled to an order of eviction on that ground alone. In respect of the sub-letting alleged against the petitioner in C.R.P No. 136 of 1979, the Rent Controller held that the sub-letting has not been proved. On the above findings rendered by the Rent Controller he ordered eviction as against all the four petitioners. On appeals filed by the petitioners, the Appellate Authority held that the ground of wilful default in payment of arrears of rent had been established as against all the petitioners, except the petitioner in C.R.P. No. 138 of 1979. As regards the ground based an *bona fide* requirement of the premises for demolition and reconstruction, the finding of the Rent Controller was also upheld by the Appellate authority. As regards the allegation of sub-letting as against the petitioner in C.R.P. No. 136 of 1979, the Appellate Authority found on the materials that the sub-letting has been duly proved. In these revision petitions the petitioners challenge the findings rendered by the Appellate Authority on the above three grounds.

2. On the question of wilful default in payment of arrears of rent, there is no dispute that for certain months the rents have not been paid. But, such default, it is urged, cannot be take to the wilful. But the finding of theappellate authority is that the default committed by the petitioners-tenants is wilful in that even if the landlady has refused to receive the rent, they should have deposited the amount in a bank or before the Rent Controller which they have not done, and once they have not remitted the rent after knowing the consequences of non-payment, the default should be taken to be wilful. On the materials, I am not able to say that the decision of the appellate authority on this question is erroneous.

3. On the question of the landlady's *bona fide* requirement of the premises for demolition and re-construction. the learned counsel for the petitioners urged that there are absolutely no *bona fides* in the request of the landlady's requirement of the premises for the purpose of demolition and re-construction. It is said

that the respondent landlady is not in such a financial position as to demolish and reconstruct the building It is also urged the plan of the building which has been filed before the Court has been obtained after filing of the petition for eviction and that that shows that the ground of the requirement of the building for the purpose of demolition and re-construction could only be an after-thought. I do not see how the obtaining of a plan subsequent to the filing of the eviction petition will show that the requirement of the premises by the landlady for the purpose of demolition and re-construction is not *bona fide*, To find out the *bona fide* of the requirement of the landlady, one has to see whether she has got sufficient funds to undertake the work of demolition and re-construction of the building. In this case the appellate Court finds that the buildings are very old and the landlady wants to demolish and reconstruct the same into a modern building with a view to get better return from the property. Exhibit A-10 is the approved plan and Exhibit A-11 is the building licence. Exhibit A-12 is the renewal licence and Exhibity A-13 is the estimate for the proposed construction. On these materials the appellate authority finds that these documents show the landlady's *bona fide* requirement of the premises for the purpose of demolition and reconstruction. The respondent has also shown that she has got ample means to undertake the demolition and re-construction. As a matter of fact, the respondent's husband as P.W. 1, has shown that there is a bank deposit of Rs 50 500 in savings account which he intends utilising to demolish and re-construct the building. On the finding of the appellate authority which is based on the materials on record it is not possible to say that the requirement of the respondent is not *bona fide* at all. I have, therefore, to accept the findings of the authorities below that the landlady requires the premises *bona fide* for demolition and reconstruction. As the above two grounds of eviction are found to have been established, it is not necessary to go into the other question as to whether the petitioner in C R. P No. 136 of 1979 is guilty of unauthorised sub-letting, as in any event, the respondent is entitled to succeed in getting an order of eviction on the two grounds. In this view, all the revisions petitions are dismissed. The petitioners will, however, have three months' time to vacate.

S.J. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

A Florance .. *Petitioner**

v.

The Director of School Education, Madras-6 and another .. *Respondents.*

Madras Co-operative Societies Act (LIII *of* 1961) *section* 101—*A clerk in a school becoming member of Co-operative Society, subsequently nominated as President and serving till* 30*th June*, 1963—*Directed to hand over charge to his successor nominee—Averment of, having handed over charge to person alleged to have been elected as President—Proceedings against petitioner resulting in his being fined Rs.* 25 *District Educational Officer insisting on management dismissing the petitioner from service—Management not complying—Ultimation by the Director of School Education threatening to withhold payment of staff grant to school—Order whether liable to be quashed.*

Held:—The conviction for an offence under section 101 of the Co-operative Societies Act related to the conduct of the petitioner outside his official duties as a clerk in the school. In those proceedings, the dispute was whether the petitioner was in actual charge of the Society when a new President was nominated. The petitioner's case was that he had already handed over charge to a person who claimed to have been elected as President by the General Body of the Society. It is true that the criminal Court had held that the petitioner was bound to hand over charge to the nominated President. But in the circumstances of the case, it cannot be said that the charge made against the petitioner involved any moral turpitude. Therefore, the direction given by the first respondent to the management of the school to dismiss the petitioner cannot be sustained as legal. [*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings of the 1st respondent in W.K. 63574/K. 3/73 dated 21st April,

*W.P. No. 5038 of 1973. 19*th December*, 1977

1973, and quash the same. (Cause title amended as per order dated 23rd December, 1975 in W.M.P. No. 8825 of 1975).

G.S Thambi for Petitioner

C. Chinnaswamy, for Government Pleader, for Respondents.

The Court made the following

ORDER:—The petitioner was a clerk in St. Antony's High School at Cape Comorin in Kanyakumari District. He became a member of the Kanyakumari Fishermen Co-operative Society in the year 1958. The Director of Fisheries nominated him as the President of the said Co-operative Society under by-law 20-A of the by-laws of the society. He was the President till 30th June, 1963. Thereafter, by proceedings dated 8th July, 1963, the Director of Fisheries has nominated one Seshiah Arachi as the President. The petitioner was asked by the Assistant Director of Fisheries, Nagercoil by his letter dated 22nd July, 1963, to hand over charge of the Society to the newly nominated President. The petitioner sent a reply that he had already handed over charge of the Society to one Thomas who claimedt o have been elected as the President. Thomas also sent a letter dated 20th November, 1963, to the Assistant Director of Fisheries stating that he has been elected as President of the Society by the general body on 30th June, 1963, and that he has taken charge of the Society from the petitioner. Since there was dispute in regard to the taking over charge of the Society by the newly nominated President, proceedings were taken under section 107 of the Madras Co-operative Societies Act (LIII of 1961) against the petitioner as well as the said Thomas. In those proceedings an order was passed by the District Magistrate directing the petitioner to hand over possession of the Society to the nominated President. The petitioner filed an appeal to the Sessions Court stating that he has already handed over charge of the Society to one Thomas as he claimed to have been elected by the general body as President of the Society and, that, therefore he is no longer in a position to hand over charge of the ociety to the nominated President. The Sessions Court, however dismissed the appeal. Subsequently, on a complaint filed by the Assistant Director of Fisheries under Section 101 of the Act, the petitioner was sentenced to pay a fine of Rs. 100 by the District Magistrate. On appeal, the fine was reduced to Rs. 25. The petitioner has duly remitted the fine.

2. Taking note of the fact that the petitioner has been sentenced to pay a fine of Rs. 25 in proceedings under section 101 of the Co-operative Societies Act, the Chief Educational Officer, Tirunelveli-2 directed the management of the School in which the petitioner has been working as a clerk to dismiss him forthwith Following that direction, the District Educational Officer, Nagercoil insisted on the management dismissing the petitioner. The management, however, did not dismiss the petitioner but represented to the District Educational Officer that the offence for which a fine of Rs. 25 was imposed on the petitioner is not an offence involving moral turpitude, that the offence for which the petitioner has been fined was only technical in nature and that in any event, the offence has nothing to do with his official duties as a clerk. Notwithstanding the said representation, the educational authorities insisted that unless the petitioner was dismissed from service, the grant-in-aid given to the school will be withheld. Since the management was unwilling to dismiss the petitioner as directed by the educational authorities, the Director of School Education by his letter dated 21st April, 1973 sent an ultimatum to the school authorities in the following terms:—

> "Even though the District Educational Officer has directed to take appropriate proceedings against him several times, no action appears to have beeen taken against him. You are directed to take appropriate action on the clerk within one week on receipt of this notice and report through the District Educational Officer. If you do not take further action on this matter, the staff grant for your school will be stopped."

Apprehensive of the threatened action by the Director of School Education to withhold payment of staff grant to the school, the petitioner has approached this Court praying for a writ of *certiorari* to quash the order of the first respondent dated 21st April, 1973.

3. The petitioner's case is that the disciplinary control only vests with the management and not with the respondents and, therefore, the respondents have no authority to direct the management to dismiss the petitioner. His further case is that the fact that he was sentenced to pay a fine of Rs 25 in proceedings under section 101 of the Co-operative Societies

Act, has nothing to do with his conduct as a clerk and that the said offence, not involving any moral turpitude, cannot be taken into account either for initiating disciplinary proceedings or for punishing him.

4. In the counter-affidavit filed by the respondents, it has not been disputed that the disciplinary control over the petitioner is with the management of the school and not with them. But the stand taken by them is that so long as the school gets the grant-in-aid from the Government, the management is bound to obey their orders. It has been admitted that no specific rules have been framed in the Private Secondary Schools Scheme to regulate the disciplinary proceedings in respect of the non-teaching staff in aided secondary schools and that the management has got the exclusive power to appoint, dismiss or punish the non-teaching staff. But it is said that the management of the school is to obey the departmental instructions issued from time to time since the school is getting the grant for non-teaching staff as well. It is not as if the first respondent directed a disciplinary enquiry to be initiated against the petitioner. By giving the direction to the management to dismiss the petitioner, the first respondent has assumed the role of the disciplinary authority which did not vest in him under the Private Secondary Schools Scheme. The mere fact that the grant is given to the school for the non-teaching staff, does not mean that the first respondent has got the power to appoint, dismiss or punish the staff. Therefore, the direction given by the first respondent to the management of the school to dismiss the petitioner does not appear to be valid or tenable at all. Since the school gets grant-in-aid from the department, it has to obey the directions issued from time to time. But the directions can only relate to the conduct of the school and not in relation to the appointment and dismissal of the non-teaching staff, as that power vests only with the management of the school. Further, the petitioner has not been found guilty of any misconduct in the discharge of his duties as a clerk either by the Criminal Court or by the management of the school which is the disciplinary authority. The conviction for an offence under section 101 of the Act related to his conduct outside the official duties. In those proceedings, the dispute was whether the petitioner was in actual charge of the Society at the time when a new President was nominated. The petitioner's case was that he has already handed over charge to a person who claimed to have been elected as President by the general body of the Society. It it true that the Criminal Court has held that the petitioner is bound to hand over charge to the nominated President. But in the circumstances of the case, it cannot be said that the charge made against the petitioner involves any moral turpitude. Therefore, the direction given by the first respondent to the management of the school to dismiss the petitioner cannot be sustained as legal. The writ petition is, therefore, allowed with costs. Counsel's fee Rs. 100.

R. S. —— *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATUE MADRAS.

PRESENT:—*G. Ramanujam, J.*

Vaiyapuri Paradesi Annadhana Chatram and Dharmasthapanam by fit person T.V. Lakshminarayana Reddiar, .. *Petitioner**

v.

The Authorised Officer, Land Reforms, Cuddalore. .. *Respondent.*

(A) *Tamil Nadu Land Reforms Act (LVIII of 1961), section 2—' Public trust of a religious nature"—Creation of trust under a document—Charity to be performed under the document more or less in the precincts of the temple—Charity whether a religious charitable trust.*

(B) *Hindu Religious and Charitable Endowment Act (XIX of 1961), section 3—Notification issued by State Government—Provisions of Act made applicabel to institution—Effect of modification—The expression "as if it were '—Meaning of.*

(C) *Fixation of different ceiling extents between private and public trusts, if warranted.*

The document in question stated that certain properties had been purchased from public subscriptions and endowed for the purpose of performing annadana dharmam, that is feeding of the poor, in a place situated just opposite to Sri Prasanna Venkatachalapathi Temple. The document also provided for the method of selection of trustees and for the due administration of the trust. But the document did

*C.R.P. No. 2694 of 1977. *31st January,* 1979

not say that the poor feeding, which was the sole object of the trust, should be conducted in connection with any festival in the temple or that it was confined only to the worshippers of the temple. The poor feeding contemplated under the document did not have any connection with the temple for the festivals conducted therein. Charity referred in the document was unconnected with the temple and its affairs. Therefore it is clear that the trust as created under the original document Exhibit A-1 dated 8th April, 1897, was purely of a charitable nature. It cannot be said that merely because the poor feeding was done in a place just in front of the temple it would make a purely charitable trust into a religious and charitable trust. To make a charitable trust a religious trust as well, it must be shown that the object of the trust had some nexus or connection with the temple or its affairs or the worship or the conduct of the festivals therein. The document of trust did not restrict the poor feeding either to the worshippers or to the persons who resort to the temple for worship. Nor was it restricted to any festival or religious function offered in the temple. The trust in this case, as originally created, was only of a charitable nature and not a religious trust of a public nature.

[*Para.* 4.]

The effect of a notification issued under section 3 of the Tamil Nadu Act XIX of 1961 is not to change or alter the character of the trust, but to treat it as a specific endowment for the purpose of the application of the provisions of the Act. This is clear from sub-section (3) of section 3 which says that on a notification issued by the Government under that sub-section extending all or any of the provisions of the Act to the charitable endowments, the provision so extended shall apply to such charitable endowment "as if it were a specific endowment". The expression "as if it were" is of considerable significance. The use of the expression indicates that a charitable endowment is not treated as a specific endowment for all purposes but it has to be treated as a specific endowment only for the purposes of the application of the provisions of the Act under which the notification has been issued. Therefore, it is not possible to say that as a result of the notification the petitioner-institution, which was only a charitable endowment, had automatically become a specific endowment or a religious institution. If it were a specific endowment, it will, of course, come under the definition of religious institution as defined in the said Act. But having regard to the fact that a charitable endowment has to be treated as a specific endowment only for the purposes of the application of the Act but not for all purposes, the character of the institution cannot be said to have been changed by the issue of the notification under section 3.

[*Para.* 6.]

There is considerable force in the contention that while a private trust as a person is entitled to hold 15 standard acres, a charitable institution which is a public trust has been deprived of such benefit by restricting the ceiling area to 5 standard acres and that this works considerable hardship on the institution. In fact there appears to be no basis for making the distinction between the ceiling extents to be held by a private trust and a public trust. It is however a matter of legislative policy and it is for the legislature to consider the question.

[*Para.* 7.]

Petition under section 83 of the Madras Act LVIII of 1961 praying the High Court to revise the Order of the Court of the Subordinate Judge of Cuddalore, dated 10th December, 1976 and made in C.M.A. No 111 of 1976.

P.S. Ramachandran, for Petitioner.

K. Venkataswami, Additional Government Pleader, on behalf of Respondent.

The Court made the following

ORDER.—**The petitioner herein is an institution called Vaiyapuri Paradesi Annadana Chatram and Dharmasthapanam situate in Nellikuppam, South Arcot District. On the ground that the said institution is only of a charitable nature and not of a public religious character, its ceiling area has been fixed at five standard acres under section 5 (1) (*b*) of the Tamil Nadu Land Reforms Act LVIII of 1961.**

2. The petitioner-institution has an extent of 55-61 acres equivalent to 27.35 standard acres. Having regard to the fact that the ceiling area for a trust of a public charitable nature is five standard acres, an extent of 22.35 standard acres had been treated as surplus, and the institution has been asked to surrender the said extent as surplus lands.

3. The claim put forward by the institution was two-fold. Firstly it contended that it is a public trust of a religious nature and therefore it is entitled to be exempted from the

provisions of section 2 of Tamil Nadu Act LVIII of 1961. Secondly, even assuming that the trust, as originally created by the founder, was only a charitable trust, as a result of the Government notifying the same under section 3 of the Tamil Nadu Act XXII of 1959, it should be taken to be a religious institution. These contentions having been rejected and the petitioner having been held to be entitled to hold only five standard acres as a public charitable institution, it filed an appeal before the Land Tribunal questioning the decision of the Authorised Officer. The Tribunal also agreed with the view of the Authorised Officer and held that the institution is only of a charitable nature and not a public trust of a religious nature so as to get the benefit of exemption from the provisions of the Act.

4. Before me Mr. P.S. Ramachandran, learned counsel for the petitioner, contends that though the documents under which the petitioner-trust has been created proceeds on the basis that it is purely of a charitable nature, still, having regard to the fact that the charity to be performed under the document is more or less in the precincts of the temple, it should be taken to be a religious trust. I have perused the document dated 8th April, 1897, Exhibit A-1, under which the trust has been created. That document says that certain properties have been purchased from public subscription and they have been endowed for the purpose of performing *annadana dharmam* that is feeding of the poor, in a place which is situate just opposite to Sri Prasanna Venkatachalapathi temple. The document also provides for the method of selection of trustees and for the due administration of the said trust. But the document does not say that the poor feeding, which is the sole object of the trust, should be conducted in connection with any festival in the temple or that it is confined only to the worshippers in the temple. The poor feeding contemplated under the document does not have any connection with the temple or the festivals conducted therein. Therefore, the charity referred to in the document is unconnected with the temple and its affairs. Therefore, it is clear that the trust as created under the original document, Exhibit A-1, dated 8th April, 1897, is purely of a charitable nature. I am not inclined to agree with the learned counsel for the petitioner that merely because the poor feeding is done in a place just in front of the temple it will make a purely charitable trust into a religious and charitable trust. To make a charitable trust a religious trust as well, it must be shown that the object of the trust had some nexus or connection with the temple or its affairs or the worship or the conduct of the festivals therein. As already stated, the document of trust does not restrict the poor feeding either to the worshippers or to the persons who resort to the temple for worship. Nor is it restricted to any festival or religious function offered in the temple. The authorities below have, therefore, come to the right conclusion that the trust in this case, as originally created, was only of a charitable nature and not a religious trust of public nature.

5. This leads to the next contention of the learned counsel which is based on a notification issued by the State Government under section 3 of the Tamil Nadu Act XIX of 1961. By a notification issued under the said section, the provisions of the said Act had been made applicable to the institution. Subsequent to the notification, the Area Committee appointed certain trustees for the said institution, exercising its power under section 12 (2) of that Act. The said order appointing the trustees of the Area Committee was challenged before this Court in *S. Krishna Reddiar* v. *Venkatakrishna Reddiar and others*[1] and Rajagopalan, J., while quashing the said order appointing the trustees observed that on the notification of the Government, under section 3, the institution has become a religious institution, and that the Area Committee had no jurisdiction to appoint trustees to such religious institutions and, therefore, the order appointing trustees by the Area Committee cannot be sustained in law. The said observation has been relied on by the learned counsel for the petitioner in support of his stand that though the trust as originally created was only of a charitable nature, it became a religious institution as a result of the notification issued by the Government, under section 3 of the Tamil Nadu Act XIX of 1961. The question, is how far this contention of the learned counsel could be accepted.

6. The effect of the notification issued under section 3 of the said Act is not to change or alter the character of the trust, but to treat it as a specific endowment for the purpose of the application of the provisions of the Act. This is clear from sub-section (3) of section 3 which says that on a notification issued by the Government

1. W.P. No. 977 of 1956.

under that sub-section extending all or any of the provisions of the Act to the charitable endowments, the provisions so extended shall apply to such charitable endowments "As if it were a specific endowment. The expression "as if it were" is of considerable significance. The use of this expression indicates that a charitable endowment is not treated as a specific endowment for all purposes but it has to be treated as a specific endowment only for the purposes of the application of the provisions of the Act under which the notification has been issued. Therefore, it is not possible to say that as a result of the notification the petitioner-institution, which was only a charitable endowment, had automatically become a specific endowment or a religious institution. If it were a specific endowment it will of course, come under the definition of religious institution as defined in the said Act. But having regard to the fact that a charitable endowment has to be treated as a specific endowment only for the purposes of the application of that Act but not for all purposes, I am of the view that the character of the institution cannot be said to have been changed by the issue of the notification under section 3. No doubt the observation of Rajagopalan, J., in the case referred to above is to the effect that on a notification the institution will come under the definition of a specific endowment and as such, under the definition of a religious institution. But the learned Judge was considering the applicability of the provisions of the Act to the institution with reference to the powers of the Area Committee to appoint trustees for the institution. There cannot be any dispute that for the purposes of the application of the provisions of the Hindu Religious and Charitable Endowments Act, the institution should be deemed to be a specific endowment. It is for that reason the learned Judge has proceeded to treat the petitioner-institution as a religious institution. Here we are not considering the applicability of the provisions of the Hindu Religious and Charitable Endowments Act to the institution. We are concerned with the applicability of the provisions of the Tamil Nadu Act LVIII of 1961 to the petitioner-institution and the mere fact that the institution has been treated as a religious institution for the purpose of another Act, on the basis of a notification issued under that Act, it cannot be said that the institution has become a religious institution as contended for by the learned counsel for the petitioner.

7. The learned counsel for the petitioner then contends that while a private trust, as a person, is entitled to hold 15 standard acres, a charitable institution which is a public trust, has been deprived of such a benefit by restricting the ceiling area to 5 standard acres and that this virtually works considerable hardship on institutions like the petitioner-institution which have been founded purely for charitable purposes. According to the learned counsel, there is no basis for showing this hostile treatment as against public charitable trusts while the Legislature has chosen to give 15 standard acres for private trusts, not coming within the scope of section 5 (3-A.) There is considerable force in the said submission of the learned counsel. In fact, there appears to be no basis for making the distinction between the ceiling extents which are to be held by a private trust and public trust and to deprive the public trust of the properties which have been endowed for ccharities by fixinga lower ceiling area. However, this is not a matter for the Court. It being a legislatlvepolicy, it is for the Legislature to consider that question.

8. In this view the Civil Revision Petition fails and is dismissed. There will be no order as to costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Nainar Sundaram, J.*

Duraisami Mudaliar .. *Petitioner**

v.

Ramasami Chettiar and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 97—Suit for declaration and possession of vacant site — Superstructure put up by defendant before institution of suit — Court directing judgment-debtor to remove superstructure—Validity—Superstructure where put up by defendant during pendency of suit or after decree—Competence of executing Court to order removal or demolition.

Where a Court directs by a decree or order that vacant possession of land should be given, that decree could be made effective by directing its own officer to remove the superstructure on it, and to deliver vacant possession of the property to the decree-holder. It might not be necessary to have any specific power is that behalf, and such a power was exercised in every case in which vacant possession was ordered. The power to remove the superstructures on the land was an incidental power necessary and ancillary to the power to deliver possession of the property. Should there be any obstruction within the meaning of Order 21, rule 97 of the Code of Civil Procedure, that has got to be dealt with specifically under the said provisions. [*Para.* 3.]

There will not be any difficulty with reference to a case where the superstructure came to be put up by the defendant either during the pendency of the suit or after the decree. In such a case, in execution of the decree for possession, the executing Court could order the removal or demolition of the construction made during the pendency of the suit or after the decree. [*Para.* 4.]

Where, however, the superstrutures were put up before the institution of the suit and were not ordered to be removed as a part of the mandate in the decree, the proper course in appropriate cases would be to direct the judgment-debtor to remove the superstructures so put up by him so as to effectuate vacant delivery of the suit site to the decree-holder. [*Para.* 5.]

Cases referred to:—

K. Arumugham Naicker v. *Sri Tiruvalluva Nainar Temple,* I.L.R. (1955) Mad. 774: (1954) 2 M.L.J. 282: 67 L.W. 489: A.I.R. 1954 Mad. 985; *Narain Singh* v. *Imam Din,* A.I.R. 1934 Lah. 978; *Mohd. Ismail* v. *Ashiq Hussain,* A.I.R. 1970 All. 648; *Kauk Sike* v. *Onq Hock Sein,* A.I.R. 1927 Rang. 82.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court, Coimbatore East at Erode, dated 31st August, 1978 and made in C.M.A. No. 118 of 1977 (in the Court of the District Munsif, Dharapuram, dated 12th October, 1977 E.A. No. 243 of 1977 in E.P. No. 155 of 1977 in O.S. No. 356 of 1963).

S. Sivasubramanian, for Petitioner.

N. Vanchinathan, for Respondents.

The Court made the following

ORDER.—The first defendant/judgment-debtor in O.S. No. 356 of 1963 on the file of the District Munsif, Dharapuram, is the petitioner in this revision petition. The first respondent herein is the decree-holder/plaintiff in the suit. Certain facts are not in dispute. The plaintiff obtained a decree declaring his right over the suit vacant site and for possession of the same. Both the trial Court as well as the appellate Court made it clear that the decree for declaration and possession is referable only to the vacant site and not to the superstructure, which is said to be in the nature of a bunk shop and is said to have been put up by the first defendant even prior to the institution of the suit. No relief is said to have been claimed by the first defendant in respect of this superstructure. The plaintiff levied execution of the decree in E.P. No. 155 of 1977. The first defendant filed E.A. No. 243 of 1977 praying for an order that the plaintiff is not entitled to possession of the superstructure mentioned in the

*C.R.P. No. 2578 of 1978.

5th December, 1978.

decree. Obviously this is an attempt to stultify the execution of the decree for possession. The contention urged by the first defendant in the first Court as well as in the lower appellate Court is that in the absence of a decree directing the removal of the superstructure, the decree in the suit for delivery of possession of the suit site alone cannot be executed. Because this contention was not appreciated and accepted by the first Court as well as the appellate Court, the present revision petition has been preferred by the first defendant. The very same contention is being repeated before me.

2. The question for consideration in this revision is when a superstructure has been admittedly put up by the judgment-debtor prior to the institution of the suit and the decree which comes to be passed in the suit does not direct the removal of the superstructure while ordering the delivery of possession, can the execution of the decree be denied to the decree-holder.

3. The statutory principle which has got to be kept in mind is that where a Court directs by a decree or order that vacant possession of land should be given, that decree can be made effective by directing its own officer to remove the superstructures on it, and to deliver vacant possession of the property to the decree-holder. It may not be necessary to have any specific power in that behalf, and such a power is exercised in every case in which vacant possession is ordered. The power to remove the superstructures on the land is an incidental power; necessary and ancillary to the power to deliver possession of the property. If, however, should there be any obstruction within the meaning of Order 21, rule 97 of the Code of Civil Procedure, that has not to be dealt with specifically under the said provisions. This has been recognised by Satyanarayana Rao, J., in *K. Arumugham Naicker and another* v. *Sri Thiruvalluva Nainar Temple by its Trustees*[1]. Of course, the learned Judge was concerned with a case, where the relationship of landlord and tenant prevailed and the proceedings were one under section 41 of the Presidency Small Cause Courts Act.

1. (1954) 2 M.L.J. 282 : 67 L.W. 489 : I.L.R. (1955) Mad. 774 ; A.I.R. 1954 Mad. 985.

4. There will not be any difficulty with reference to a case where the superstructures came to be put up by the defendant either during the pendency of the suit or after the decree. In such a case, in execution of the decree for possession, the executing Court can order the removal or demolition of the construction made during the pendency of the suit or after the decree. Such was also the view expressed in *Narain Singh* v. *Imam Din*[1] and that has been followed by D. S. Mathur, J., in *Mohd. Ismail* v. *Ashiq Hussain*[2], suggesting appropriate directions according to the needs of particular cases.

5. Where, however, the superstructures were put up before the institution of the suit and were not ordered to be removed as a part of the mandate in the decree, the proper course in appropriate cases would be to direct the judgment-debtor to remove the superstructures so put up by him so as to effectuate vacant delivery of the suit site to the decree-holder. In *Kauk Sike* v. *Onq Hock Sein*[3], Duckworth, J., passed an order in the second appeal as follows:

> "I modify the order of the lower Court by directing that the appellant to vacate the building on the land as soon as this order is communicated to him and that he be granted two months from this date within which, if he so pleased, he may dismantle the building and remove its material."

The directions adopted by Duckworth, J., were followed by D. S. Mathur, J., in *Mohd. Ismail* v. *Ashiq Hussain*[2] and the learned Judge observed that where the constructions were made before the institution of the suit, the rule laid down in the Rangoon case could be adopted.

6. I am inclined to follow the ratio enunciated by D. S. Mathur, J., in the Allahabad decision to the facts of the present case and that presents a workable solution in a case like the present one where the superstructure was put up by the defendant before the institution of the suit and there is

1. A.I.R. 1934 Lah. 978.
2. A.I.R. 1970 All. 648.
3. A.I.R. 1927 Rang. 82.

an omission in the decree to direct its removal. If the above principle is kept in mind, I do not find that the judgment-debtor could put forth any tenable objection with reference to the execution of the decree as it now stands. I do not find any merit in the contention of the first respondent/revision petitioner and accordingly this civil revision petition is dismissed. But there will be no order as to costs. However, adopting the ratio set out above, the first defendant/judgment-debtor is granted four weeks time from today to remove the superstructure if he so desires. In case the first defendant/judgment-debtor does not remove the superstructure so as to facilitate delivery of vacant possession of the suit site to the decree-holder, the executing Court will deliver the property to the decree-holder as it stands at the time of the delivery, leaving the decree-holder to decide as to how to deal with the superstructure.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and S. Ratnavel Pandian, J.*

G. T. Venkataswamy Reddy, Prop., Sri Vinayaga Motor Service .. *Appellant**

v.

The State of Tamil Nadu, represented by the Secretary to Government, Home Department, Fort. St. George, Madras-9, and another .. *Respondents.*

Constitution of India (1950), *Article 226—Bus plying between Bangalore and Tirupattur —Permit for second bus obtained based on need and the travelling occupancy of the region—Grant of permit* de hors *inter-State agreement—Tax collected at both ends—Claim for exemption at single point based on inter-State agreement — Claim negatived as grant was* de hors *the inter-State agreement —* Mandamus *refused.*

The appellant, after satisfying that there was need for a second bus over the route, namely, Bangalore to Tirupattur, secured a permit from the appropriate authorities under the Motor Vehicles Act in the State of Karnataka and again obtained a counter-signature from the authorities in the State of Tamil Nadu. This grant was previously based on need and the travelling occupancy of the region and had no relevancy to or reference to the inter-State agreement, dated 1st May, 1973. The appellant claimed for exemption and benefit of single point taxation pursuant to inter-State agreement. But the grant in question was *de hors* the inter-State agreement. The appellant filed a writ petition against the State of Tamil Nadu and the State Transport Authority at Madras to forbear from collecting Motor Vehicle Tax and to refund the tax already collected claiming benefit under the inter-State agreement. The writ petition for issue of *mandamus* was dismissed and hence the appeal.

*W.A. Nos. 427 and 428 of 1978 in W.P. Nos. 558 and 559 of 1978 respectively.

4th September, 1978.

Held: Exemptions were granted in the matter of payment of tax by a specific language used in a particular statute or by an incidental contract. They cannot spring by necessary implication as in an exemption to pay tax there is no equity in it and there cannot be any intendment in it either. The purpose of the writ was to compel action and not to undo what had been done. In the instant case, it was clear that there was no duty enjoined on the respondents to grant the benefit of single point taxation, for the grant which was made admittedly was not covered by the inter-State agreement and equally did not provide for such an exemption. There was already one bus in operation pursuant to inter-State agreement. The second bus belonging to the appellant was put on the route and on the sector because of the need and was outside the pale of the agreement. Such being the facts of this case, no writ of *mandamus* could issue. [*Para*. 2.]

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice Mohan, dated 20th April, 1978 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 558 and 559 of 1978, presented under Article 226 of the Constitution of India to issue a writ of (*i*) *mandamus* forbearing the second respondent herein from demanding and collecting tax in view of the exemption under the inter-State agreement published in *Tamil Nadu Government Gazette Extraordinary*, No. 139, dated 1st May, 1975 for the bus MYA 2484 plying on the route Bangalore to Tiruppattur (W.P. No. 558 of 1975 and (*ii*) directing the first respondent to refund the tax of Rs. 37,840 paid by the petitioner for the quarter-ending 31st March, 1978 as the petitioner is entitled for exemption and benefit of single point taxation pursuant to inter-State agreement Published in *Tamil Nadu Government Gazette, Extraordinary* No. 139, dated 1st May, 1973 in its notification No. G.O. Ms. No. 1178, Home, dated 30th April, 1973 No. II-1, No. 1909 (c) of 1973 Annexure-I, Clause VI relating to the bus MYA 2484 plying on the route Bangalore to Tiruppattur (in W.P. No. 559 of 1978).

D. H. Siddhalingappa, for Appellant.

The Order of the Court was made by

Ramaprasada Rao, CJ.—These two appeals arise out of a common order of a learned single Judge of this Court who refused to issue a writ of *mandamus* forbearing the second respondent before him from demanding and collecting the motor vehicle tax, in view of the alleged exemption under the inter-State agreement published in the *Tamil Nadu Gazette, Extraordinary*, dated 1st May, 1973, for the bus MYA 2484 plying on the route Bangalore to Tiruppattur and concurrently for the issue of a direction to the first respondent to refund a tax of Rs. 37,840 paid by the appellant for the quarter ending 31st March, 1978, as the appellant is entitled for exemption and benefit of single point taxation pursuant to the inter-State agreement as above. The history of the grant need not be traced excepting to state that the appellant before us, after satisfying that there was need for a second bus over the route, namely, Bangalore to Tirupattur, secured a permit from the appropriate authorities under the Motor Vehicles Act in the State of Karnataka and again obtained a counter-signaure from the authorities in this State also. This grant was primarily based on need and the travelling occupancy of the region and had no relevancy to or reference to the inter-State agreement dated 1st May, 1973. It is conceded before us that in the inter-State agreement there was no provision for a second bus to operate on the same route. But the grant in question is *de hors* the inter-State agreement. This was because of certain proceedings which the appellant took in this Court in W.P. No. 3384 of 1973. In that writ petition, this Court directed the State Transport Authority to dispose of the application of the appellant for a fresh or a new grant for the very same route after considering the need etc., for the same. Though the State Transport Authority rejected the same initially and the State Transport Appellate Authority also concurred with the State Transport Authority, the High Court, in C.R.P. No. 3431 of 1974, remitted the subject-matter to the State Transport Appellate Tribunal for re-consideration. On such remand, the Appellate Tribunal allowed the appeal and granted counter-signature holding that there was need for an additional service to the route. Thus, it is seen that the present grant in favour of the appellant was because there was

need for additional service on the route and it does not spring from the inter-State agreement as between the State of Tamil Nadu and the State of Karnataka, dated 1st May, 1973, which provides for the grant of one bus for operation on the above specified route. Under the inter-State agreement a benefit is provided to the operator who gets a permit from one or the other of the State and equally the counter-signature from the other State, enabling the operator to have the benefit of single point motor vehicles taxation. This benefit is extended to both regular and temporary permits. The learned Judge when he was asked to issue a writ of *mandamus* as sought for, rightly held that the exemption from payment of tax will be for vehicles covered by the reciprocal agreement and not to such of those permits granted outside its purview. It is in this perspective that Mohan, J., denied the rule and hence the appeals.

2. Learned counsel for the appellant concedes, as we said, that this grant is outside the context of the grant which could have been given under the inter-State agreement. Different and indeed independent considerations prevailed over the hierarchy of Tribunals functioning under the Motor Vehicles Act when they granted a second permit to the appellant to operate on the very same route *de hors* the inter-State agreement. The basis of the grant was, need for additional service on the route. This cannot be misunderstood, therefore, as a grant which also could gain the benefit under clause (6) of the inter-State agreement, which runs as follows:

> "Transport Vehicles covered by counter-signature in the reciprocating State shall be exempted from payment of motor vehicles tax to the reciprocating State. This benefit of single point taxation shall apply to stage carriages having both regular and temporary permits. In regard to other categories of transport vehicles covered by counter-signature this benefit of single point taxation shall apply only if the vehicles have regular permits."

What is urged before us is that the above exemption could be extended even to grants granted *de hors* the inter-State agreement, so long as the route is covered by such an agreement. We are unable to agree. Exemptions are granted in the matter of payment of tax by a specific language used in a particular statute or by an incidental contract. They cannot spring by necessary implication as in an exemption to pay tax there is no equity in it and there cannot be any intendment in it either. In so far as the grant in favour of the appellant is concerned it is not stated before us that it was so granted subject to a condition that he need pay only a single point tax. That is not the case either before the single Judge of this Court or before us. In those circumstances, the question is whether the exemption granted could be demanded through a writ of *mandamus*. It is by now well-settled that the applicant who seeks for a writ of *mandamus* should have a legal right to the performance of a non-discretionary legal duty by the person against whom a writ is sought. Even so, the right must be a public right and the duty to be enforced is of a public nature. An element of compulsion to perform the legal duty should be apparent on the record. The purpose of the writ is to compel action and not to undo what has been done. In all cases in which such an issuance is requested for, there should be a statutory duty on the part of the other party to be performed. In other words, it should be incumbent on the part of the other party to perform the duty and then only a writ of *mandamus* which is a high prerogative writ could be granted as it cannot otherwise be granted as a matter of course. In the instant case, it is clear that there is no duty enjoined on the respondents to grant the benefit of single point taxation, for, the grant which was made admittedly is not covered by the inter-State agreement and equally does not provide for such an exemption. The said grant having been made or availed of in the ordinary course and having regard to the need in the particular sector of operation, it cannot be demanded as of right, for the respondents are not legally obliged to perform the duty of exempting the appellant from double point taxation; nor are they obliged to refund the amount already collected as if such collection is outside the pale of law. Mohan, J., therefore, rightly held that there was absolutely no scope for invoking clause (6) of the agreement extracted above which would take in only cases of persons covered expressly by the agreement. There is already one bus in operation pursuant to inter-State agreement.

The second bus belonging to the appellant was put on the route and on the sector because of the need and is outside the pale of the agreement. Such being the facts of this case, no writ of *mandamus* can issue and rightly, therefore it has been refused by the learned single Judge. The writ appeals are dismissed.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

N. Subbanna .. .. *Petitioner**

v.

N. Seshagiri Rao and another .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent) Control Act (XVIII of 1960), as amended by Act (XXIII of 1973)—Appeal by un-successful tenant in eviction proceedings pending—Sale of building by landlord—Purchaser whether can be impleaded as a party affected and continue proceedings.

The purchaser of a property in the course of proceedings under the Rent Control Act filed by his vendor against the tenant can be brought on record for the purpose of continuing the application filed by the quandom owner, namely, his vendor, and the mere fact that the tenant has at the instance of the quandom owner, attorned to the purchaser, who wishes to bring himself on record in those proceedings, would not be a material interdict which would prevent the subsequent purchaser from being brought on record for continuing the proceedings either at the original stage or at the execution stage. *Manavar Basha* v. *Narayanan*, (1961) 2 M.L.J. 176: 73 L.W. 692: A.I.R. 1961 Mad. 200, relied on. [*Para.* 2.]

Case referred to:—

Manavar Basha v. *Narayanan*, (1961) 2 M.L.J. 176: 73 L.W. 692: A.I.R. 1961 Mad. 200.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act XXIII of 1973, praying the High Court to revise the order of the Court of Small Causes, Madras (IV Judge) dated 10th February, 1977 and made in H.P. No. 1978 of 1976 in W.R.A. No. 218 of 1976.

K. Kumaraswamy, for Petitioner.

A. Subrahmanya Iyer and *M. Kanakaraj*, for Respondent.

The Court made the following

ORDER.—The order of the Appellate Authority against which this civil revision petition has been filed is unsustainable. The petitioner is the subsequent purchaser of the property which was in the occupation of the first respondent. The second respondent was the quandom owner of the property. I say quandom owner, because after filing the application for eviction against the first respondent and during the course of such proceedings, the second respondent sold the property to the petitioner by a registered sale deed, dated 2nd July, 1976. Admittedly that was at a stage when the appeal filed by the unsuccessful tenant in the eviction proceedings was pending. The Appellate Authority dismissed the application of the petitioner for his being brought on record in the appellate proceedings on the only ground that the Code of Civil Procedure was not applicable to proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act. Reference was made to some Government order which appears to be irrelevant. The question before me is whether the purchaser of a property, who has purchased the same during the pendency of some eviction proceedings filed by his vendor against the tenant, can continue the proceedings and whether in such proceedings he can seek for being impleaded as a party affected. Mr. Subrahmania Iyer says that the appeal filed by the first respondent had already been dismissed and that therefore any adjudication on this question would be purely academic. Mr. Kumaraswamy, learned counsel for the petitioner, on the other hand says that the execution petition filed by the second respondent pursuant to the dismissal of the appeal filed by the tenant was resisted again by the tenant on the only ground that the second respondent was no longer the owner of the property and that it had been sold already to the petitioner

*C. R. P. No. 980 of 1977. 28th September, 1978.

herein. The tenant was therefore running from pillar to post so as to avoid eviction on all possible, but misconceived, grounds. As against such an order of dismissal made by the executing Court, it appears that the present purchaser intends to file a civil revision petition as the person really aggrieved by the said order. This is however, a different matter. But having regard to the history and course of this litigation, I am unable to agree with Mr. Subrahmania Iyer that the decision on the question posed by me would be merely of academic interest.

2. The purchaser of a property, in the course of proceedings under the Rent Control Act, can be brought on record for the purpose of continuing the application filed by the quandom owner, namely, his vendor, and the mere fact that the tenant has, at the instance of the quandom owner, attorned to the purchaser, who wishes to bring himself on record in those proceedings, would not be a material interdict which would prevent the subsequent purchaser from being brought on record for continuing the proceedings either in the original stage or at the execution stage. No more authority is required for the proposition as nearly seventeen years ago, this question was set at rest, after eminent counsel argued in this Court, on the very point now mooted before me, in *Manavar Basha* v. *Narayanan*[1], by Jagadisan, J., I am entirely in agreement with the ratio in that decision. Having regard to the continuance of the litigation in the manner referred to by me earlier, and as the interests of the petitioner are yet to be safeguarded in accordance with law and in a manner known to law, I set aside the order of the Court below and hold that the petitioner is a proper person to be impleaded in the above proceedings and he ought to have been impleaded as such. The Civil Revision Petition is accordingly allowed. There will be no order as to costs.

R.S. —— *Petition allowed.*

1. (1961) 2 M.L.J. 176 : 73 L.W. 692 : A.I.R. 1961 Mad. 200.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.* and *S. Ratnavel Pandian, J.*

Savani Transport (P.) Ltd., represented by its Divisional Manager, S. M. S. Jain .. *Appellant**

v.

The Madras Aluminium Company Ltd., Coimbatore represented by its Director, Venkataswami Naidu and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 20 — Jurisdiction of particular Court to hear disputes—Clause in contract of affreightment between parties relating to the matter fixing Bombay Court —Suit for damages filed in Coimbatore where defendant had a subordinate office—Maintainability of suit.

The first defendant, a businessman of Eluru placed an order with the plaintiff at Coimbatore for supply of goods. The order was transmitted to the latter's factory at Mettur. The goods were delivered to the second defendant, a carrier, with head-office at Bombay and branch offices at Coimbatore and Mettur for being transported to Eluru. There was a clause in the contract of affreightment that the contract shall be deemed to have been made at Bombay and that Courts in Bombay alone had jurisdiction to decide all claims arising under the consignment. In an action *inter alia* against the second defendant, the carrier, for damages brought in Coimbatore it was contended that the suit was not competent as it should have been brought in Bombay only.

Held: The contract of affreightment in the instant case came into effect consequent on negotiations either at Coimbatore or Mettur. The cause of action arose at Mettur. The concerned clause in the affreightment contract ought not to be interpreted to mean that the parties had contracted, specifically as to the choice of the Court in which they should agitate. Such a choice will be available only

* A. S. No. 13 of 1974. 25th July, 1978.

when there are two competent Courts which can entertain a cause. That is not the case here. The Bombay Court is not the competent Court so far as the cause of action which had arisen in this case is concerned. No question of choice was left to the parties and the clause relied on cannot apply. [*Para.* 3.]

It is well-established that when there are two competent Courts which could entertain a cause of action, then the parties could make a choice on their own and vest the jurisdiction to adjudicate any dispute *inter se* amongst themselves in one of such competent Courts. Section 20 of the Civil Procedure Code provides for suits to be instituted where the defendant resides or the cause of action arises. It is more for the benefit of the plaintiff who can find the defendant and institute the action at the place where he resides or where he carries on business. The *Explanation* to the section says that a corporation shall be deemed to carry on business at its sole or principal office in India, or in respect of any cause of action arising at any place where it has also a subordinate office at such place. The *Explanation* is only explanatory of the situation and the fiction that a corporation shall be deemed to carry on business at its sole or principal office is a general statement having regard to the provisions of the Companies Act and the specific prescribed procedure in the Civil Procedure Code. But, the latter part of the *Explanation* makes it clear that, in respect of any cause of action arising at any place where it has also a subordinate office the cause of action should be deemed to arise at such place also. [*Para.* 3.]

Hence, the plea that the suit should be brought only in Bombay, in the instant case and not in the Court at Coimbatore is not tenable. [*Para.* 3.]

Appeal against the decree dated 29th September, 1973 of the III Additional Subordinate Judge, Coimbatore in Original Suit No. 479 of 1970.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—The second defendant, who was the carrier and who was not successful in O.S. No. 479 of 1970 on the file of the Subordinate Judge of Coimbatore, is the appellant. The plaintiff, whose head-office is at Coimbatore and factory at Mettur *inter alia* agreed to sell to the first defendant goods of the value of Rs. 63,038.01 and in pursuance of such an understanding it entrusted the said goods to the second defendant, who was the carrier and who was also having branch offices at Coimbatore and Mettur. It is common ground that the goods were loaded under Exhibits B-1 and B-2 which constitute the contract of affreightment. It was made clear even at the time of entrustment of the goods with the second defendant that the consignee was the Punjab National Bank at Eluru, where the first defendant was carrying on business, that the negotiable documents were to be handed over to the Punjab National Bank for collection and retirement of the demand draft representing the value or the price of the goods and that the documents of title to the goods ought not to be parted to any one other than the Punjab National Bank, who, for all purposes for this suit, could be described as the consignee. It happened that the second defendant did not have a lorry of his own at the time when the goods were to be transmitted from Coimbatore to Eluru and, therefore, he requisitioned the lorry belonging to the third defendant. It appears that D.W. 3 drove the vehicle and there is some dispute, as would be seen hereafter, whether it was D.W. 3, who drove the vehicle, who gave away the documents of clearance to the first defendant without reference to the consignee, or D.W. 4, who, according to the third defendant, was driving the vehicle. The fact remains that contrary to the express directions given by the consignor, namely, the plaintiff, the second defendant or his agents, whether it is the third defendant's driver or any other person, actually delivered the documents of title to the first defendant, who, without paying for the goods and without signing the documents of title as was agreed to, took over the documents and failed to pay the price. The plaintiff, therefore, was obliged to call upon both the first defendant as well as the second defendant to account for the value of the goods—the first defendant as the person to whom the goods were delivered by the second defendant without the requisite authority to do so, and as against the second defendant as the transporter of the goods who failed to adhere to the terms of contract of affreightment read along with the instructions

which accompanied it, which compelled him to deliver the documents of title not to the first defendant but to the Punjab National Bank, which was the accredited consignee in the bargain. The suit was, therefore, laid by the plaintiff for the value of the goods. But it should be made, however, clear, as would be seen hereafter, that the second defendant, for reasons not very clear, collected two drafts and a cheque, as seen from Exhibits A-11, A-12 and A-13 obtained by him from the first defendant and then passed them on to the plaintiff towards the price of the goods. The cheque, which was enclosed along with Exhibit A-13 did bounce and on account of such failure of consideration of the negotiable instruments and also because part of the price of the goods was not paid by the first defendant and additionally for the reason that the second defendant as a carrier was negligent in the discharge of his duties under the contract of affreightment and committed the plaintiff to loss, the suit was filed for recovery of the unaccounted value of the goods against both the first and the second defendants. The first defendant remained *ex parte*. The second defendant, in the first instance, filed a written statement on 21st September, 1970 raising various pleas on merits. On the eve of the trial of the suit, however, about three years later, he sought surprisingly enough, for permission to file an additional written statement and obtained such permission on 21st February, 1973. In the additional written statement the plea was that the Court at Coimbatore did not have the jurisdiction to entertain the claim as there was a clause which was printed at the back of Exhibit B-1, which stipulates that all disputes arising under or out of the contract of entrustment or affreightment shall be adjudicated by Courts at Bombay. After having filed the additional written statement, the second defendant once again, with the obvious intention of safeguarding his rights, sought for permission to implead the third defendant and also for relief as against the third defendant in case a decree is passed against him after trial. This was attempted under the special procedure available to a defendant in a litigation under Order 8-A of the Civil Procedure Code. It is common ground that the second defendant in that procedure, known as the third party procedure, claimed to be entitled to contribution from or indemnity against the first defendant, who was already on record and the third defendant, whom he wanted to implead as a party to the action and that third party summons was also issued. With such pleadings so completed, trial proceeded and the learned Judge negatived all the defences of the second defendant and decreed the suit as against defendants 1 and 2 and would not agree with the claim of the second defendant that he is entitled to contribution from the third defendant under the third party procedure. It is as against this, the present appeal has been filed.

2. We have not dealt with the merits of the case because they are not in dispute. In fact, learned counsel for the appellant confined his contentions to five points before us. The first one was that it is only the Bombay Court which had jurisdiction to entertain the suit and the Court at Coimbatore could not entertain it and that the suit, therefore, was not maintainable. Secondly, it was said that there is a misjoinder of causes of action. The third contention was that by acceptance of the drafts and the cheque, which were sent as enclosures to Exhibits A-11, A-12 and A-13, there has been a waiver of the second defendant's liability by an overt act on the part of the plaintiff and, that therefore, no decree can be passed as against him. The fourth point was that the claim for interest as against him as if he is a primary party responsible to the plaintiff in the bargain is an extreme relief granted to the plaintiff. The last contention, which arose incidentally after the acceptance of the third party procedure by the trial Court, is that the third defendant also should have been made liable and should have been asked to contribute for payment of the decree which was passed against the appellant and the exoneration by the lower Court of the third defendant is wrong and, therefore, the judgment to that extent has to be interfered with. No other point either on merits or on law was argued before us.

3. In so far as the first point is concerned, it is well-established that when there are two competent Courts which could entertain a cause of action, then the parties could make

a choice on their own and vest, the jurisdiction to adjudicate any dispute *inter se* amongst themselves in one of such competent Courts. The question, therefore, is whether the Bombay Court is a competent Court at all to enable the parties hereto to make a choice out of the Court in Bombay and the Court at Coimbatore. The order was placed by the first defendant at Coimbatore, as is seen from Exhibit A-33. This order was transmitted to the plaintiff's factory at Mettur under Exhibit A-34. As the first defendant was at Eluru, a carrier was sought for. The second defendant, who was having various branch offices and his head office at Bombay, had a branch office both at Coimbatore as well as at Mettur. He was contacted, and the goods were handed over at the factory site at Mettur, as is seen from Exhibits B-1 and B-2. The principal contention of Mr. Varadarajan, learned counsel for the appellant, is that under Exhibit B-1 there is a reference to the conditions on the reverse and that this is to be found in a prominent part in the front portion of Exhibit B-1. The clause relied upon is that the contract shall be deemed to have been entered into and made with the administrative and Head Office of the company at Bombay and that it is, therefore, expressly agreed that the Courts in Bombay alone shall have jurisdiction in respect of all claims and matters arising under the consignment or of goods entrusted for transport. This is not a contract which is enforceable in the eye of law. The plaintiff, who has the head office in one part of India, cannot of his own motion and without regard to the provisions of the Civil Procedure Code, say, that, notwithstanding the fact that his commercial activities are in any other State or in any other part of the country, such commercial activities and problems arising thereunder shall and should be adjudicated upon by the Bombay Courts and Bombay Courts alone. This is against the spirit of the law of contracts and against the prescribed procedure under section 20 of the Civil Procedure Code. Section 20 provides for suits to be instituted where the defendant resides or the cause of action arises. It is more for the benefit of the plaintiff who can find the defendant and institute the action at the place where he resides or where he carries on business. No doubt, the *Explanation* to section 20 says that a corporation shall be deemed to carry on business at its sole or principal office in India or in respect of any cause of action arising at any place where it has also subordinate office at such place. This is pressed into service. We are afraid this is against the appellant. The *Explanation* is only explanatory of the situtation and the fiction that a corporation shall be deemed to carry on business at its sole or principal office is a general statement having regard to the provisions of the Companies Act and the specific prescribed procedure in the Civil Procedure Code. But the latter part of the *Explanation* makes it clear that, in respect of any cause of action arising at any place where it has also a subordinate office the cause of action should be deemed to arise at such place also. This is a case where the second defendant has no doubt his head-office at Bombay, but admittedly it has its subordinate office both at Coimbatore and a Mettur. It is as a result of the negotiations which took place as between the plaintiff on the one hand and the second defendant on the other, either at Coimbatore or at Mettur, that the contract of affreightment has come into effect. Therefore, even on the *Explanation* relied upon by the learned counsel for the appellant the cause of action has arisen at Coimbatore. As already stated, clause (17) at the back of Exhibit B-1 ought not to be interpreted to mean that the parties have contracted specifically as to the choice of the Court in which they should agitate. Such a choice, as we made it clear even in the beginning, can only be thought of when there are two competent Courts which can entertain a cause. That is not the case here. The Bombay Court is not the competent Court so far the cause of action which has arisen in this case is concerned. It has arisen at a place where the subordinate office of the second defendant is situate. Therefore, it has arisen either at Coimbatore or at Mettur. There was, therefore, no choice left to the parties such as the plaintiff and the second defendant to choose as between Courts in Bombay and at Coimbatore. Therefore, clause 17 would not be applicable to the facts of this case and even if it was intended that the second defendant made it obligatory that all disputes shall be adjudicated only in Bombay, by reason of such a contract, then such a

contract is unenforceable because that contract does not reflect upon the intention of the parties in the matter of the election exercised as between them with regard to the choice of one of the competent Courts. We are unable, therefore, to agree with the first contention that the Coimbatore Court had no jurisdiction to entertain the claim. We may also add that the challenge against jurisdiction was hesitantly taken. We have already seen that for nearly three years the plea was not taken until an additional written statement was filed with permission. That was nearly three years after the filing of the original written statement. Even before us, in the grounds of appeal, there is no specific plea that the Bombay Court alone has jurisdiction to entertain the suit. We are not, therefore, satisfied that the plea that the suit is not maintainable in the Court at Coimbatore is sustainable.

4. The second contention is that there is misjoinder of causes of action. We have seen that the suit itself is based on the plea that there has been a total loss to the plaintiff who entrusted their goods with the second defendant for carriage and which goods were wrongfully delivered by the agent of the second defendant to the first defendant, even though the specific named consignee was the Punjab National Bank. In these circumstances, the plaintiff came to Court with two factors which were known to him, firstly that his goods have gone into the hands of the first defendant, who, even though, was aware of his responsibility to pay for it, did not pay, and secondly that it was due to the act of negligence on the part of the second defendant and/or his agents that the goods were delivered to the first defendant. The suit no doubt could be said to be for recovery of the part price of the goods. But the case of recovery of damages for the negligence on the part of the second defendant is so intricately connected with the main cause of action that it could be fairly presumed that it is such an integrated sequence of events that gives a cause of action to the plaintiff to file the present suit. It cannot, therefore, be said that impleading the first defendant as the person who is responsible for the payment of the price of the goods and making the second defendant also contemporaneously liable for the loss occasioned to the plaintiff on account of the misdelivery of the goods are so far as under from one another that it could be said that there is no commensality in the cause of action as pleaded by the plaintiff. We are unable to agree that there is misjoinder of causes of action.

5. The third contention of the appellant was that by reason of the acceptance of the drafts and the cheque which were the enclosures to Exhibits A-11, A-12 and A-13, there has been a waiver of the second defendant's responsibility. This is based on the contention that the plaintiff having accepted the drafts and having been put on notice of the dishonour of the cheque, he should be deemed to have exonerated the second defendant from further liability. This would be begging the question. The second defendant throughout was acting independently and was trying probably to keep the fair name as a carrier by persuading the first defendant to pay for the goods wrongfully delivered to him. It was this activity of the second defendant which resulted in the collection of the drafts and the sending of the cheque to the first defendant. It was not as if the first defendant volunteered to pay the amount to the plaintiff and there has been an independent negotiation and resultant settlement between the plaintiff and the first defendant without reference to the second defendant. If at all any payment was received from the first defendant, either in the shape of drafts or by means of cheque which was ultimately dishonoured, it was only at the instance of the second defendant who assumed responsibility from the beginning and that cannot be understood, and much less misunderstood, as giving up of the rights which had already accrued in favour of the plaintiff as against the second defendant. Thus, therefore, there is no waiver of the right to claim loss from the second defendant as pleaded by him.

6. The next point urged was that the appellant is not liable to pay interest, as it is only the first defendant, who is primarily responsible for non-payment of the price of the goods. We have already referred to the fact that the loss which was occasioned to the plaintiff in the instant case is not attributable solely to the non-payment of the price by the first defendant, but to the negligent act on the part of the second defendant and

or his agent. In that sense, therefore, if the second defendant is liable to pay the principal amount claimed, then it follows that he is liable to pay interest as well.

7. The final contention of the second defendant is that the lower Court was wrong in having exonerated the third defendant, though he was brought into the arena of the case under the special third party procedure. The merits have been fully considered by the learned Subordinate Judge, and we are not inclined to repeat them. What is relied upon by the appellant in Exhibit B-3, which, according to him, establishes that it was the driver of the third respondent who irregularly delivered the goods without regard to the plaintiff's mandate in the invoice that it should be so delivered to the consignee, the Punjab National Bank. It may be so. But the third defendant was only acting as the agent of the second defendant in the matter of the carriage of goods entrusted to him (second defendant). The third defendant was never in the picture. He was brought into the picture by the second defendant. In fact, he treated the third defendant independently, paid the freight charges payable to him, filed a small cause suit O.S. No. 318 of 1970 on the file of the District Munsif, Eluru and made the first defendant liable for such freight charges paid by him to the third defendant. In all respects, therefore, the second defendant treated the third defendant as a party different from the parties to the main transation. He only took him for purposes of carriage and if he had any independent cause of action against him, he could agitate it in other proceedings, but not in a summary procedure under the third party procedure. We are not expressing, however, an opinion on this finally, as it is not necessary to do so. The finding of the Court below is that Exhibit B-8, on which sole reliance is placed upon by the second defendant to make the third defendant liable for the said claim, has been found to be not acceptable. Though it has been signed by D.W. 3, yet it was brought out that he did not have any knowledge of its contents, as it was dictated by the second defendant's agent examined as D.W. 2. That was written in English and D.W. 3 did speak to the fact that he was not aware of its contents and that he signed after the same was dictated by D.W. 2. The finding of fact is that D.W. 3 did not have any knowledge of its contents. Even on a fair examination of Exhibit B-8 it is seen that it was a typed letter in which the driver's signature is taken. Factually we accept the findings of the Court below that the driver cannot be said to have had knowledge of the contents of Exhibit B-8 and that therefore, the third defendant cannot vicariously be made responsible for what his employer said in Exhibit B-8. Further, no negligence on the part of the third defendant or his driver has been established with certainty and, therefore, the claim for indemnity or contribution, which could only be claimed by one defendant as against the other in the third party procedure, is not sustainable. The lower Court was right in having exonerated the third defendant.

8. In the result, the appeal fails and it is dismissed. In the circumstances there will be no order as to costs.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

M. S. Narayana Iyer .. *Petitioner**

v.

A. C. A. Funds, Palayamkottai and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 10, 14 and 25—Scope and applicability—Petition by debtor for adjudication—Plea of inability to pay the debt—Nature of enquiry by the Court.

Inability to pay debts is made a condition precedent in the presentation of a debtor's petition. The Court has got to be satisfied, of course, *prima facie* that the debtor is not in a position to pay his debts. An enquiry by the Court will not exclude an investigation of the fact for itself. Of course the Court is not required to go into an elaborate enquiry as to the validity or otherwise of the debts and it is sufficient if the Court is satisfied *prima faice* about the inability of the debtor to pay his debts. If a debtor fails to make out a *prima facie* case, his petition must fail. The question of abuse of process of Court and the question of genuineness of the debts are not very germane for consideration of a debtor's petition under the provisions of the Provincial Insolvency Act. At the same time, it is not for the Court under the first proviso to section 75 (1) of the Act, to interfere with the appreciation of materials considered by the Court unless it is possible to hold that the decision of the Court below is not in accordance with law. [*Para.* 15.]

Cases referred to:—

Chhatrapat v. *Kharag,* (1917) 44 I.A. 11: 32 M. L. J. 1: A. I. R. 1916 P.C. 64; *Lakshminarayana Aiyar* v. *Subramania Aiyar,* (1923) 45 M.L.J. 129: A.I.R. 1923 Mad. 585; *Ramasami* v. *Narayanasami,* (1925) 48 M.L.J. 100: 21 L.W. 318: A.I.R. 1925 Mad. 483 (2); *Narayanappa* v. *Bheemappa,* (1926) 24 L.W. 219: A.I.R. 1926 Mad. 494; *Perianambi* v. *Narasimha Aiyar,* (1928) 56 M.L.J. 597: A.I.R. 1928 Mad. 1193; *Venkatachala Udayar* v. *Kasi Pandaram,* (1964) 1 M.L.J. 261; *Krishnappa* v. *Kasi Viswanathan,* (1966) 1 M.L.J. 210: 78 L.W. 648: A.I.R. 1966 Mad. 331; *Mohanakrishnan* v. *Gopalaswami Naidu,* (1969) 2 M.L.J. 140; *Lingasami Goundar* v. *Subramanian,* (1974) 2 M.L.J. 166; *District Official Receiver* v. *Lakshmi Ammal,* (1974) 2 M.L.J. 397; *Malini Naicker* v. *Seth Manghraj,* (1969) 2 S.C.J. 831: (1970) 1 An.W.R. (S.C.) 1: (1970) 1 M.L.J. (S.C.) 1: (1969) 3 S.C.R. 898: A.I.R. 1969 S.C. 1344.

Petition under section 75 (1) of Provincial Insolvency Act praying the High Court to revise the Order of the District Court, Tirunelveli, dated 25th April, 1974 and made in C.M.A. No. 88 of 1973 (I.P. No. 17 of 1972 Additional Subordinate Judge, Tirunelveli).

T. R. Mani, for Petitioner.

S. Umapathy of *M|s. Raj & Raj,* for 1st Respondent.

K. Kumaraswami Pillai, for 4th Respondent.

S. Desikan, for 6th Respondent.

Francis Rayan, for 9th Respondent.

The Court made the following

ORDER.—The petitioner-debtor in I.P. No. 17 of 1972 on the file of the Subordinate Judge, Tirunelveli is the petitioner in this revision. The said petition was filed by him under sections 10 and 13 of the Provincial Insolvency Act (hereinafter referred to as 'the Act') to adjudge him an insolvent on the ground that his debts exceeded his assets and hence he was unable to pay them. He set forth the necessary particulars in support of his case. Some of the creditors, who were arrayed as respondents, contested the said petition by saying that the debtor had enough means to pay off all his debts; and they projected the necessary particulars in support of their contentions. The Subordinate Judge, Tirunelveli mooted out for consideration the point as to whether the petitioner|debtor has *prima facie* established that he is unable to pay off his debts from the available sources. Evidence, oral and documentary, was adduced

*C.R.P. No. 107 of 1975. *27th January,* 1978.

both by the petitioner-debtor and the respondents-creditors. On an investigation of the materials placed before him, the Subordinate Judge came to the conclusion that the petitioner-debtor is possessed of sufficient means to pay off his debts, and there is no need to adjudge him an insolvent and in that view, dismissed his petition.

2. Aggrieved by the above decision, the petitioner-debtor filed an appeal, C.M.A. No. 88 of 1973, which came to be heard and disposed of by the District Judge Tirunelveli on 25th April, 1974. The appellate Court formulated for consideration the point as to whether the petitioner-debtor is *prima facie* unable to pay his debts, and on consideration of the materials on record, found the point against him and dismissed the appeal. The present revision is filed by the petitioner-debtor against the said orders, under section 75 (1) of the Act.

3. Mr. T. R. Mani, learned counsel for the petitioner, would contend that the Courts below have transgressed the rules of consideration of the questions involved in a debtor's petition under sections 10, 24 and 25 of the Act and hence the orders of the Courts below stand vitiated. The learned counsel relies on the following decisions in support of his contentions:

In *Chhatrapat* v. *Kharag*[1], it is stated:

"The Provincial Insolvency Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion, but is a statutory right: and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the Court. Any misconduct of a debtor is to be visited with its due consequences at the time of the debtor's application for discharge and not on the initial proceeding".

5. In *Lakshminarayana Aiyar* v. *Subramania Aiyar*[2], referring to the proviso to section 24 (1) (*a*) of the Act, it was pointed out that the debtor can be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing his allegation. On the admitted facts, it was found that the debtor's debts amounted to over Rs. 40,000 and his assets to over Rs. 51,000 and that the properties which constituted his assets were under attachment and presumably would be sold, and it was accordingly not possible for the debtor to realise the price for himself or to use them for the payment of his debts; and hence there was sufficient *prima facie* proof of inability to pay debts.

1. (1917) 44 I.A. 11 : 32 M.L.J. 1 : A.I.R. 1916 P.C. 64.
2. (1923) 45 M.L.J. 129 : A.I.R. 1923 Mad. 585.

5. In *Ramaswami* v. *Narayanasami*[1], I find from the facts stated therein that originally one creditor filed the petition, that afterwards three more petitioners were added, and one creditor opposed the petition and a Division Bench of this Court held:

"Where the insolvent himself gives evidence saying that he is unable to pay the debts and where the situation is as if he is himself the petitioner, there is no purpose in closely scrutinizing the acts of insolvency".

6. In *Narayanappa* v. *Bheemappa*[2], a Division Bench of this Court discountenanced an enquiry as to the reality of some of the debts.

7. In *Perianambi Srirangachariar* v. *Narasimha Aiyar*[3], Devadoss, J., pointed out that the proof that is required of a debtor, who filed an application to be adjudicated an insolvent, that he is unable to pay his debts, is only a *prima facie* proof.

8. In *Venkatachala Udayar* v. *Kasi Pandaram*[4], Venkatadri, J., was concerned with a case where apart from the fact that the debtor applied for adjudication as insolvent on the ground of inability to pay his debts, the opposing creditor having obtained a decree against the debtor was taking execution by way of arrest, and the learned Judge held that it is not necessary for the debtor to prove each and every debt mentioned by him.

9. In *Krishnappa* v. *Kasi Viswanathan*[5], Natesan, J., laid down that where a debtor

1. (1925) 48 M.L.J. 100 : 21 L.W. 318 : A.I.R. 1925 Mad. 483 (2)
2. (1926) 24 L.W. 219 : A.I.R. 1926 Mad. 494.
3. (1928) 59 M.L.J. 597 : A.I.R. 1928 Mad. 1113.
4. (1964) 1 M.L.J. 261.
5. (1966) 1 M.L.J. 210 ; 73 L.W. 648 : A.I.R. 1966 Mad. 331.

applies for adjudicating himself as insolvent, all that the Court has to see is whether there is compliance with the provisions of section 10 of the Act, and the statutory right of the debtor cannot be deprived of on the ground that it is an abuse of the process of Court.

10. In *Mohanakrishna* v. *Gopalaswami Naidu*[1], Ramaprasada Rao, J., referring to a debtor's petition, observed:

"when once he satisfies the prescribed conditions which the Legislature has set as a *sine qua non* enabling him to get himself adjudicated an insolvent, the Court has no option except to consider his request and grant the prayer, the other requirements being satisfied".

11. In *Lingasami Goundar* v. *Subramanian*[2], Ramaprasada Rao, J., while defining the scope of enquiry under section 24 of the Act, laid down:

"When the statute uses the word *prima facie* grounds 'for believing the statement of the debtor of his inability to pay his debts, the degree of the burden of proof that is called for by the statute is not to be equated to the degree of proof as is always necessary in an ordinary civil litigation............ In my view such a detailed examination is not warranted. If a person approaches the Court by inflicting on himself the ignominy of his inability to pay his debts and in consequence seeks for an order adjudicating him insolvent, then, unless there is strong evidence to disprove such a voluntary confession made by him, the Court need not at that stage employ itself in a deep enquiry regarding the opulence of the debtor and his ability to pay his debts. A summary enquiry is indicated; *prima facie* proof is called for and if that is undertaken and if a decision is rendered by the appropriate Court, then it cannot be said such an order is without jurisdiction or suffers from any material irregularity. The High Court also, under section 75 (1) of the Act, is only expected to see whether the order of the appellate Court is in accordance with law or not. The lower Court says that *prima facie* it is satisfied that the respondent is unable to pay his debts. This is a finding based on appreciation of material considered by the Court below. The order otherwise cannot be said to be not in accordance with law".

1. (1969) 2 M.L.J. 140.
2. (1974) 2 M.L.J. 166.

12. With regard to the scope of interference under section 75 (1) proviso of the Act by the High Court, in revision, certain principles have been recognised and laid down by this Court as well as the Supreme Court. It will be pertinent to refer to the dictum laid down by Ramaprasada Rao, J., in *District Official Receiver* v. *Lakshmi Ammal*[1], wherein the learned Judge observed:

"The scope of the powers of the High Court under section 75 (1) of the Provincial Insolvency Act is narrow. Interference is possible by the High Court against the order of the District Court only on a question of law. The findings of fact rendered by the tribunals created under the Act are findings which are final provided for in section 75 (1) itself".

13. In *Malini Naicker* v. *Seth Mangiraj*[2], while defining as to when a decision will be not "according to law" within the meaning of section 75 (1), proviso (1) of the Act, the Supreme Court laid down that a decision being contrary to law as provided in section 100 (1) (*a*) of the Civil Procedure Code is not the same thing as a decision being not according to law as prescribed in the first proviso to section 75 (1) of the Act. It has been further laid down that a wrong decision on facts by a competent Court is also a decision according to law and if the Legislature intended to confer power on the High Court under the first proviso to section 75 (1) of the Act, to re-examine both questions of law and fact, it would have conveyed its intention by appropriate words as has been done under various other statutes. As to when a decision would be not "according to law", the Supreme Court observed as follows:

1. (1974) 2 M.L.J. 397.
2. (1969) 2 S.C.J. 831 : (1970) 1 M.L.J. (S.C.) 1 : (1970) 1 An.W.R.(S.C.) 1 : (1969) 3 S.C.R. 898: A.I.R. 1969 S.C. 1344.

"Though it may not be possible to give an exhaustive definition of the expression "according to law" instances in which the High Court may interfere under the provision can be given. They are cases in which the Court which made the order had no jurisdiction or in which the Court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at".

14. Keeping the ratio laid down by the above decisions in mind, we find that certain principles do emerge with reference to the consideration of the questions involved under the provisions of the Act with regard to a petition for adjudication filed by the debtor on the ground that he is unable to pay his debts. Inability to pay the debts is made a condition precedent in the presentation of a debtor's petition. The Court has got to be satisfied, of course, *prima facie* that the debtor is not in a position to pay his debts. An enquiry by the Court will not exclude an investigation of the fact for itself. Of course, the Court is not required to go into an elaborate enquiry as to the validity or otherwise of the debts and it is sufficient if the Court is satisfied *prima facie* about the inability of the debtor to pay his debts. If a debtor fails to make out a *prima facie* case, his petition must fail. The question of abuse of process of Court and the question of genuineness of the debts are not very germane for consideration of a debtor's petition under the provisions of the Act. At the same time, it is not for this Court, under the first proviso to section 75 (1) of the Act, to interfere with appreciation of materials considered by the Court unless it is possible to hold that the decision of the Court below is not in accordance with law. As for instances when the decision of the Court can be said to be not "according to law" guidelines have been set down by the decision of the Supreme Court in *Malini Naicker* v. *Seth Manghraj*[1], referred to above.

15. I have been taken through the orders of the two Courts below and I cannot say that the Courts below have transgressed the limits of the scope of enquiry into a debtor's petition as laid down by the judicial precedents referred to above. The Courts below have correctly set out the point for consideration, *viz.*, as to whether the debtor has *prima facie* established that he is unable to pay off his debts. It is not as if a consideration of this question will not involve some amount of enquiry and an investigation is totally excluded. In fact, in an enquiry, an investigation, of course not a deep one, is expected of the Courts when they enquire into a debtor's petition for self-adjudication. I am not able to persuade myself to hold that the enquiry held and the consideration of this question by the Courts below have transgressed the principles set out above. The two Courts below having found that it cannot be held that the debtor is *prima facie* unable to pay his debts, it is not competent, in the exercise of the revisional jurisdiction under the first proviso to section 75 (1) of the Act, to interfere with such decisions. In this view, the revision is dismissed, but there will be no order as to costs.

R.S. ——— *Revision dismissed.*

1. (1969) 2 S.C.J. 831: A.I.R. 1969 S.C. 1344.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*T. Ramaprasada Rao, CJ.* and *S. Ratnavel Pandian, J.*

M.S.N.Pandia Nadar .. *Appellant**

v

The Collector of Madurai and another .. *Respondents.*

(A) *Natural justice—Principles—Violation alleged possession and cultivation of land by 'P' pursuant to an earlier order of the Government as lessee for the purpose of cardamom cultivation—Lease for a period of ten years—No default by lessee —Government notice asking lessee to transfer the land to the Forest Department for preservation of shola land and hill atmosphere—Notice whether liable to be quashed.*

(B) *Constitution of India* (1950), *Article* 226—*Duty of the Court to see whether the grantor acted within the framework of the grant.*

(C) *Maxim*—"Audi alterem partem"—*Applicability.*

Natural justice has often been described as not being a principle which has to be tested by subjective standards but ought to be used with a certain amount of specificity and objectivity. In a contract like the one under consideration, when a right is reserved by the grantor to snap the lease during the tenure of the lease, then it cannot be said that the grantee had in him the vested right which he can claim until the priod of expiry of the term of the lease granted under the original Government Order. The very fact that the appellant was conscious of the terms of the contract whereby it could be snapped after giving him three months' notice by the grantor presumes that it is a fallible right and not an infallible one for him to treat it as having been interfered with, if such a right is disrupted by an overt act on the part of the grantor as a result of an action expressly contemplated under the terms of the contract. It only remains for a Court of law exercising jurisdiction under Article 226 of the Constitution to see whether the grantor has acted within the framework of the grant and if such action has been taken and is provided for under the grant, then no question of violation of the principles of natural justice would arise. Even so, the principles of *audi alterem partem* would not arise for the simple reason that no question of hearing the lessee does arise in a case if such contract contemplated the cessation of contractual right by the grantor giving a three months' notice to the lessee and thus putting an end to the contract. So long as such a condition in a contract is valid and enforceable, violation of the principles of natural justice cannot be urged or put in fore-front for opposing such an act on the part of the grantor who severed the ties of contractual relationship as per the provisions of the contract itself. [*Para.* 3.]

*W.A. No. 37 of 1979. 17th *January*, 1979.

Appeal under Clause 15 of the Letters Patent against the Order of Mr. Justice Ramanujam, dated 5th January, 1979 and made in the exercise of Special Original Jurisdiction of the High Court in Writ Petition No. 13 of 1979 presented under Article 226 of the Constitution of India, to issue a writ of *certiorari* calling for the records of the Collector of Madurai relating to the order R.O.C. No. J9/178829/G/78. dated 7th October, 1978 and quash the same as illegal and without jurisdiction.

H V. Krishnan, for Appellant.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—This appeal is against the order of Ramanujam, J., in Writ Petition No. 13 of 1979 wherein the appellant-petitioner sought for the issue of a writ of *certiorari* to quash a notice dated 7th October, 1978 issued by the first respondent stating that the Government accepted the recommendation of the Additional Collector, Madurai and endorsed by the Board of Revenue that the land now under cultivation and in the possession of the appellant pursuant to an earlier G.O., R.O.C. No.104151/G/75.J9, dated 4th June, 1975 as lessee thereof, for the purpose of cardamom cultivation, be transfered to the forest department in order to preserve the shola land and hill area atmosphere. This notice was challenged by the appellant on three grounds, firstly that the original lease covered by G.O.R.O.C.No. 104151/G/75.J9, dated 4th June, 1975, enabled him to remain in possession as lessee for the purpose of raising cardamom for a period of ten years and that he having not committed any default conceivable under the contract, the sudden order of remand without giving him an opportunity to explain himself is irregular, secondly

that the Government acted *mala fide* in having singled out the appellant for resuming the land while the other lessees have not been disturbed for the said purpose, and thirdly, it is said, that cardamom being a foreign exchange earner, it was not in public interest for the Government to snap the lease prematurely and thus make a dent. in the national economy of the country.

2. As regards the first point, Ramanujam, J., referred to the conditions under the contract and found that the respondents had the right to terminate the lease after giving three months' notice and it is not in dispute that such a notice was given to the appellant. In these circumstances, he would not agree with the appellant that there was a failure of the principles of natural justice; in that an adequate opportunity was given to the appellant to state his case advocating against resumption. As regards the complaint based on *mala fides* the learned Judge was of the view that there is not enough material on record to show that Government had singled out the appellant alone for the purpose of resuming the lands, for, he expressed that it is not possible at this stage to say that the Government may not take action against similar lessees in the locality The third contention before us is a new one which was not apparently placed before the learned single Judge.

3. The same contentions are repeated before us. Natural justice has often been described as not being a principle which has to be tested by subjective standards but ought to be used with a certain amount of specificity and objectivity. In a contract like the one under consideration, when a right is reserved by the grantor to snap the lease during the tenure of the lease, then it cannot be said that the grantee had in him the vested right which he can claim until the period of expiry of the term of the lease granted under the original Government order. The very fact that the appellant was conscious of the terms of the contract whereby it could be snapped after giving him a three months' notice by the grantor presumes that it is a fallible right and not an infallible one for him to treat it as having been interfered with, if such a right is disrupted by an overt act on the part of the grantor as a result of an action expressly contemplated under the terms of the contract. It only remains for a Court of law exercising jurisdiction under Article 226 of the Constitution to see whether the grantor has acted within the framework of the grant and if such action has been taken and is provided for under the grant, then no question of the violation of the principles of natural justice would arise. Even so the principles of *audi alteram partem* would not arise for the simple reason that no question of hearing the lessee does arise in a case if such a contract contemplated the cessation of contractual right by the grantors giving a three months' notice to the lessee and thus putting an end to the contract. So long as such a condition in a contract is valid and enforceable, violation of the principles of natural justice cannot be urged or put in the forefront for opposing such an act on the part of the grantor who severed the ties of contractual relationship as per provisions of the contract itself. We are unable, therefore, to accede to the first contention.

4. As regards the second contention based on *mala fide*, the only ground on which it is founded is that the petitioner's lands in the vicinity were acquired for a public purpose and that the petitioner opposed such an acquisition and on account of such opposition, the respondents have taken this drastic measure of terminating the contract of lease. Apart from the fact that this is a far-fetched contention, the appellant-petitioner has not established that he has been singled out for the purpose in question. As the learned single Judge says, it is not possible at this stage to speculate whether the Government may not take action against similar lessees in the locality. Viewed in this perspective, this contention is a premature one. Apart from it *mala fides* have to be brought home to the person who is said to have perpetrated it. In public interest, certain lands of the appellant-petitioner were acquired for a public purpose, that being a different and separate subject altogether, totally unconnected with the determination of the lease in question. Excepting for making a link as between the two, which we have characterised as far-fetched, no other allegation of *mala fides* has been made out or brought on record. The second contention therefore fails.

5. Thirdly it is said that cardamom being a foreign exchange, earner, it would not be in public interest to annex lands capable of yielding a crop which could earn foreign exchange to a forest. The appellant forgets that improvement of forests and preservation of forests is also one of the essential public duties of a State and viewed in that light, if one aspect of public interest is borne in mind by the State, when the notice of termination of

the lease is given, the citizen cannot complain. The best Judge to decide as to what would be in the interest of national economy is the State and not the Court. We are therefore unable to accede to the contention of the learned counsel for the appellant that on the ground that there has been an interference with the raising of cardamom crop which is a foreign exchange earner, the order challenged ought to be interfered with cannot be countenanced.

6. All the three contentions therefore fail and the writ appeal is dismissed.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.R. Gokulakrishnan and A. Varadarajan, JJ.*

A.K.A.CT. V.C.T. Meenakshisundaram Chettiar .. *Appellant**

v.

A.K.A.CT.V.C.T. Venkatachalam Chettiar .. *Respondent**

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955) sections 12 (4), 35—Suit for accounts—Suit valued at Rs. 12,000 by plaintiff—Valuation accepted by trial Court—Suit dismissed—Appeal by plaintiff—Valuation of suit raised by defendant—Plaintiff held to have not valued the suit properly—Directions given for payment of additional court fees.

The plaintiffs had executed a general power-of-attorney on 22nd January, 1965 authorising the defendant to transact all his business, sell his properties etc. The plaintiff was a partner in a firm. The plaintiff's share in the firm was taken over by one *A* who paid the defendant as agent of the plaintiff, as alleged by plaintiff, a sum of 6,50,000, dollars equivalent to Rs. 16,12,000. The plaintiff, filed a suit for directing the defendant to render a true and correct account of all the transactions made by the defendant as agent of the plaintiff from 22nd January, 1965. In the plaint, the plaintiff had alleged that thedefendant had sent to him Rs. 6,37,401.65 out of amounts received from *A* and claimed that the defendant had still to account for Rs. 9,74,598 35 being the balance amount received from *A*. In valuing the suit for purposes of court-fees, the plaintiff had valued the same at Rs. 12,000 under section 35 (1) of the Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955). The trial Court accepted the valuation. The suit was however dismissed. The plaintiff filed an appeal. In the appeal, the valuation was brought to the notice of the Court and the respondent (defendant) claimed that the plaintiff's valuation was sham and nominal.

Held: Under section 12 (4) of the Tamil Nadu Court-fees and Suits Valuation Act a Court of Appeal either on its own motion or on the application of any of the parties, could consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint. [*Para.* 10.]

If the estimate made by the plaintiff, was sham, nominal and dishonest, the Court had power to direct the plaintiff to pay the proper Court-fee after valuing his claim properly. Such valuation of the plaintiff's claim should no doubt be based on the plaint allegations and also on the averments made by him in the interlocutory application made on the strength of the plaint. [*Para.* 28.]

The plaint made it clear that apart from the money which the defendant was liable to pay the plaintiff as agent of the plaintiff, the plaintiff had quantified the amount of Rs. 9,74,598.35 as payable by the defendant to him. The plaintiff ought to have valued the suit at about Rs. 9,74,598.35 which he had to get apart from the amounts received by the defendant on his behalf in the course of his agency as and from 22nd January, 1965. [*Para.* 32.]

The appellant had to value the suit for the purpose of court-fee and jurisdiction at Rs. 9,74,598.35 and pay the deficit court-fee. [*Para.* 34].

Cases referred to:—

Parameswaran v. *Sarveswaran*, (1960) 1 M.L.J. 468: A.I.R. 1960 Mad. 260; *State* v. *Teta Ram*, A.I.R. 1971 J & K. 71; *Kapurchand* v. *State Government of Madhya Pradesh*, A.I.R. 1954 Nag. 48; *Kashinath* v. *Tukaram*, A.I.R. 1956 Nag. 195; *Lal Bijai Saran* v. *Chandra Bahadur*, A.I.R. 1957 All. 754; *Om Prakash* v. *Maya Ram*, A.I.R. 1964 All. 430; *Mohd Ajmal* v. *Indian Chemical Co.*, A.I.R 1978 All. 21; *Rathnavarmaj* v. *Smt. Vimala*, (1962) 1 S.C.J. 60: (1962) 1 M.L.J.

*A. No. 408 of 1972. 22nd December, 1978.

(S.C.) 36: (1962) 1 An. W.R. (S.C.) 36: (1961) 3 S.C.R. 1015: A.I.R. 1961 S.C. 1299; *Rachappasubbarao* v *Shidappa Venkatrao*, I.L.R. (1919) 43 Bom. 507; *Sathappa Chettiar* v. *Ramanathan Chettiar*, 1958 S.C.J. 407: 1958 S.C.R. 1021: (1958) 1 An. W.R. (S.C.) 148: (1958) 1 M.L.J. (S.C.) 148: A.I.R. 1958 S.C. 245; *Venkatanandam, In re*., (1933) 64 M.L.J. 122: I.L.R. 56 Mad. 705 37 L.W. 106: A.I.R. 1933 Mad. 330; *Sathappa Chettiar* v. *Ramanathan Chettiar*, (1955) 2 M.L.J. 408: 68 L.W. 659: A.I.R. 1955 Mad. 682; *Ramayya* v. *Ramaswami*, (1913) 24 M.L.J. 233; *Narayana* v. *Periappan*, (1938) 2 M.L.J. 557: 48 L.W. 454: I.L.R. (1938) Mad. 1031: A.I.R. 1938 Mad. 887.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai dated 13th December, 1971 and passed in O.S. No. 83 of 1969.

Kesava Iyengar, for Appellant.

M.R. Narayanaswami, for Respondent.

The Order of the Court was made by

Gokulakrishnan, J.—The plaintiff is the appellant. The suit was filed for directing the defendant to render a true and correct account of all the transactions made by the defendant as plaintiff's agent from 22nd January, 1965 and also of all the amounts received by him as agent of the plaintiff including the amount received from Alagappa and to pay the plaintiff what may be found due by him and also for directing the defendant to pay the plaintiff the costs of the suit.

2. The facts of the case, in a nutshell, are that the plaintiff, on 22nd January, 1965, executed a general power-of-attorney at Karaikudi authorising the defendant, who is the respondent in this appeal, to transact all his business, sell his properties, receive the sale price and other moneys etc., that the defendant, as plaintiff's agent, received from Alagappa 6,50,000 dollars, equivalent to Rs. 16,12 000 being the one-fourth share of the plaintiff in the partnership firm which was taken over by Alagappa and another and that the defendant, from Madras, had sent to the plaintiff at Kottaiyur, Rs. 25,000 on 25th October, 1965, Rs. 1,30,750 on 7th June 1965, Rs. 25,311.65 on 7th February, 1966 and Rs. 4,56,340 on 11th August, 1967. It has been further alleged in the plaint that the defendant has failed to render accounts until the date of the plaint and as such the defendant is liable to render accounts. For the purpose of court-fee the plaintiff has valued the suit at Rs. 12,000 under section 35 (1) of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955, and has paid a court-fee of Rs. 900.50 under that provision. He has stated in the plaint that much more amount will be due, and that if, on taking of accounts, more is found due to the plaintiff, the plaintiff will pay court-fee for the excess so found and ascertained.

3. The defendant *inter alia* contended that he has appointed one Murugappa Chettiar as the substituted agent of the plaintiff and such appointment was made by the power given by the plaintiff in the power-of-attorney executed on 22nd January, 1965 in favour of the defendant. The defendant has also contended that he is not liable to render accounts and that the plaintiff must look to Murugappa Chettiar for getting the relief which he has prayed for in the plaint. In paragraph 19 of his written statement the defendant has stated that the suit is not properly valued and proper court-fee has not been paid. The defendant has also stated that the suit is barred by limitation.

4. In the reply statement, the plaintiff, who is the appellant, herein, has reiterated that the defendant is liable to account as prayed for by him in the plaint and that the allegation in the written statement to the effect that the plaint valuation is not proper and proper court-fee has not been paid, is wrong and untenable.

5. On the pleadings, the Subordinate Judge of Devakottai framed as many as nine issues. Issue No. 6 was as follows:

> "Has the suit been properly valued and has proper court-fee been paid?"

The aforesaid issue No. 6 came to be tried as a preliminary issue. The learned Subordinate Judge, by his order dated 21st January, 1971, held that the plaint has been properly valued and proper court-fee has been paid. In his order, he observed that it is true that it has been averred in the plaint that the defendant received the value of the plaintiff's share in the assets of the firm as his agent, that the defendant has not informed the plaintiff about the amounts he had received and that one cannot expect the plaintiff to know what

amounts the defendant has received on his behalf even though it is admitted by the parties that the share of the plaintiff's assets in the firm was valued at 6,50,000 dollars. The learned Subordinate Judge held that the valuation of the suit for purposes of court-fee at Rs. 12,000 cannot be said to be wrong. He also observed that the plaintiff cannot be expected to know the amounts received by the defendant on his behalf and as such the valuation of the plaint at Rs. 12,000 for purposes of court-fee is proper and proper court-fee has been paid.

6. Subsequently, the Subordinate Judge tried the main suit itself and dismissed the same holding that Murugappa Chettiar is the substituted agent of the plaintiff, that the suit is barred by limitation and that the plaintiff is not entitled to the relief of accounting as against the defendant.

7. Aggrieved by the judgment and decree, the plaintiff has preferred the above appeal.

8. Mr. Kesava Iyengar, the learned counsel appearing for the appellant submitted that the decision of the trial Court is not correct and that the defendant is liable to account as per the prayer in the plaint. It is unnecessary to elaborately deal with the argument advanced by Mr. Kesava Iyengar at this stage, inasmuch as we intend in the first instance to consider the correctness of the valuation of the plaint and the court-fee paid by the plaintiff in the suit and in the appeal.

9. Mr. M.R. Narayanaswami, the learned counsel appearing for the respondent-defendant brought to our notice the provisions in section 12 (4) of the Tamil Nadu court-fees and Suits Valuation Act XIV of 1955, and submitted that this Court can consider the correctness of the order passed by the lower Court affecting the fee payable by the plaintiff and can determine the proper fee payable on the plaint and on the memorandum of grounds of appeal.

10. Section 12 (4) of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955 reads as follows:

"(a) Whenever a case comes up before a Court of Appeal it shall be lawful for the Court, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other proceeding in the lower Court and determine the proper fee payable thereon.

Explanation.—A case shall be deemed to come before a Court of Appeal even if the appeal relates only to a part of the subject-matter of the suit.

(*b*) If the Court of Appeal decides that the fee paid in the lower court is not sufficient, the Court shall require the party liable to pay the deficit fee within such time as may be fixed by it.

(*c*) If the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower Court and which the appellant seeks in appeal the appeal shall be dismissed, but if the default is in respect of a relief which has been decreed by the lower Court, the deficit fee shall be recoverable as if it were an arrear of land revenue.

(*d*) If the fee paid in the lower Court is in excess the Court shall direct the refund of the excess to the party who is entitled to it."

It is clear from the above section that a Court of Appeal, either on its own motion or on the application of any of the parties, can consider the correctness of any order passed by the lower Court affecting the fee payable of the plaint.

11. As far as the present case is concerned, our attention was drawn to the allegation in the plaint filed by the appellant. In paragraph 6 of the plaint, it is stated:—

"On 27th March, 1965, the plaintiff and the defendant retired from the said partnership and the other two brothers continued the business under the same name Alagappa taking on the shares of the plaintiff and the defendant and all their assets in the firm for a consideration of his paying 6,50,000, equivalent to Rs. 16,12,000 at the rate of Rs 248 per 100 Dollars to each of them, so that Alagappa became entitled to ¾ share and Annamalai to ¼ share in the continuing firm".

Paragraph 7 of the plaint states:—

"As the plaintiff's agent and on behalf of the plaintiff, the defendant on or about 13th April, 1965, received from Alagappa

6,50,000 equivalent to Rs. 16,12,000 at the rate of Rs. 248 per 100 Dollars for the ½ share of the plaintiff in the said firm taken over by Alagappa."

Paragtaph 8 of the plaint states:—

"The defendant from Madras has sent to the plaintiff at Kottaiyur Rs. 25,000 on 25th October, 1965, Rs. 1,30,750 on 7th February, 1966, Rs. 25,311-65 on 7th February, 1966 (Rs. 25,000 plus Rs. 311·65 for interest) and Rs. 4,56,340 on 11th August, 1967, and nothing more".

Paragraph 9 of the plaint states:—

"The defendant as plaintiff's agent is bound to render true and correct account to the plaintiff of all the amounts received by him in the course of the agency, to wit, from 22nd January, 1965, the amounts received from Alagappa and pay the plaintiff the amounts that are still with him, less the amounts already paid".

Paragraph 12 of the plaint states:—

"The valuation of the suit for purposes of court-fee and jurisdiction is Rs. 12,000. The plaintiff values the relief for rendering of accounts at the tentative valuation of Rs. 12,000 under section 35 (1) of the Madras Court-fees Act XIV of 1955. Much more will be due. If on taking of accounts more is found due by the defendant the plaintiff will pay the additional court-fees and has paid Rs. 900.50 under section 35 (1) of the Court-fees Act".

12. The trial Court, while deciding as a preliminary issue, *i.e.*, issue No. 6 relating to correctness or otherwise of the valuation of the suit and the court-fee paid in its order dated 21st January, 1971 has observed:

"it has been further averred in the plaint that defendant has not informed him what amounts he had received and that the defendant managed to retain the letters written by him requesting him to send an account of the amounts received by him. We cannot expect the plaintiff to know that amount the defendant received on his behalf even though if it is admitted by the parties that the shares of the plaintiff's assets in the firm was valued at $ 6,50,000 and taken over by his elder brother Alagappa Chettiar".

This observation of the trial Court, in our view, is not correct in view of the clear and unambiguous allegations made by the plaintiff in his plaint which we have already extracted in the paragraph supra. There is no ambiguity in the allegations made in the plaint as regards the defendant receiving from Alagappa $ 6,50,000 on or about 13th April, 1965. The said amount in dollars is equivalent to Rs. 16,12,000 There is equally no ambiguity in the plaint allegation as regards the defendant sending from Madras various amounts, in all amounting to Rs. 6,37,401-65, to the plaintiff at Kottaiyur. The plaintiff has also made a prayer in the plaint that the defendant be directed to render a true and correct account to the plaintiff of all the amounts received by him in the course of his agency from 22nd January, 1965 and pay the plaintiff the amount that will be still with him less the amounts already paid. Thus it is clear from the allegations made in the plaint itself that the defendant has to pay to the plaintiff the sum of Rs. 16,12,000 *minus* Rs. 6,37,401-65, which comes to Rs. 9,74,598. 35 and apart from this amount the defendant must also render a true and correct account to the plaintiff of all the amounts received by him in the course of his agency as and from 22nd January, 1965, which is the date on which the plaintiff executed a general-power of attorney at Karaikudi authorising the defendant to transact all his business, sell his properties, receive the sale price and other moneys etc. After making such averments in the plaint, the plaintiff has valued the suit for purposes of court-fee and jurisdiction only at Rs. 12,000 under section 35 (1) of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955, stating that much more will be due from the defendant. No doubt, the plaintiff has stated that if on taking of accounts, more is found due by the defendant the plaintiff will pay court-fee for the excess so found and ascertained. After so stating the plaintiff has paid a court-fee only Rs. 900·50 under section 35 (1) of the Tamil Nadu Court-fees and Suits Valuation Act, XIV of 1955.

13. Section 35 (1) states as follows:—

"In a suit for accounts, fee shall be computed on the amount sued for as estimated in the plaint".

Mr. Kesava Iyengar, the learned counsel appearing for the appellant, contended that the estimate made by the plaintiff is final and cannot be questioned by this Court nor by the defendant. The learned counsel also contended

that there having been a decision by the trial Court as regards the correctness of the court-fee paid on the plaint, and no appeal or revision having been filed by the respondent against that decision, this Court, at this stage, cannot go into the correctness of the court-fee paid on the plaint or in the appeal. The learned counsel further contended that there would be no loss to the Government even if the amount due to the plaintiff on taking of accounts is found to be much more than the value he has mentioned in the plaint, by virtue of the provisions contained in section 35 of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955. Section 35 (2) states:—

> "Where the amount payable to the plaintiff as ascertained in the suit is in excess of the amount as estimated in the plaint, no decree directing payment of the amount as so ascertained shall be passed until the difference between the fee actually paid and the fee that would have been payable had the suit comprised the whole of the amount so ascertained, is paid. If the additional fee is not paid within such time as the Court may fix, the decree shall be limited to the amount to which the fee paid extends."

Stressing on the above provision in section 35 Mr. Kesava Iyengar strenuously contended that valuation of the suit at a lesser amount will not in any way be detrimental to the Government. He cited certain decisions which deal with the revisional powers of the High Court on the question of payment of court-fees. We shall presently discuss the provisions of the Court-fees Act on this aspect and also consider the relevant decisions which were brought to the notice of this Court.

14. There is absolutely no difficulty in coming to the conclusion, on a reading of section 12 (4) (*a*) of the Tamil Nadu Court-fees and Suits Valuation Act XIV of 1955, that this Court can either on its own motion or on the application of any of the parties consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other proceedings in the lower Court and determine the proper fee payable thereon. From the allegations in the plaint, which we have extracted already, it is clear that the plaintiff is definite in his claim for Rs. 9,74,598.35, apart from the other amounts payable by the defendant on taking of accounts. Having regard to the definite amount which the plaintiff has stated that he has to get from the defendant, the valuation of the suit for purposes of court-fee and jurisdiction at Rs. 12,000 is palpably low and it shocks the conscience of the Court. No doubt, section 35 states that court-fee shall be computed on the amount sued for as estimated in the plaint. The 'estimate' that has to be made by the plaintiff as contemplated in the provisons of section 35, must be an honest estimate which must approximately come very near the amount the plaintiff expects to get and need not be precise. 'Estimate' according to Shorter Oxford Dictionary, means "approximate calculation based on probabilities". The plaintiff, in his plaint, has averred that the defendant has received a sum of Rs. 16,12,000 as his agent and towards that, the defendant has paid on various dates, a sum totalling to Rs. 6,37,401·65. Thus it is clear that the plaintiff expects, on the probabilities of the present case, at least a minimum amount of Rs. 9,74,598.35. Hence the valuation made at Rs. 12,000 in the plaint cannot be considered as 'estimate' at all as provided under section 35 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. In our view, the valuation made in the plaint is not an honest estimate.

15. This Court had occasion to deal with section 12 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, in *Parameswaran* v. *Sarveswaran*.[1] That case came up before this Court by way of revision. The trial Court directed the plaintiff, who was the petitioner before the High Court, to pay the court-fee on Rs. 32,000 less the court-fee already paid on the plaint. In that case, the plaintiff filed the suit for accounts of a dissolved partnership from 1948 upto the date of the suit and to have the assets realised including therein the goodwill, plant and machinery, which according to him, were wrongfully taken over by the defendants. In paragraph 22 of the plaint, it was stated that the plaintiff estimated his share of the assets payable to him in the sum of Rs. 8,000. A court-fee of Rs. 600 was paid under section 36 (1) of the Tamil Nadu Cour-fees and Suits Valuation Act, 1955. There was also an undertaking to pay an additional court-fee after the ascertainment of the amount due to him. The first defendant in that case questioned the correctness of the valuation of the plaint, and issue No. 15 was raised as to the proper court-fee payable on the plaint. The Assistant City Civil Judge before whom the suit was pending, held that the proper value on the basis of the plaint

1. (1960) 1 M.L.J. 468: A.I.R. 1960 Mad. 260.

would be a sum of Rs. 32,000, and he required the plaintiff to pay the additional court-fee thereon. Aggrieved by the order of the trial Court on issue No. 15, the plaintiff filed the civil revision petition before the High Court challenging the correctness of the order requiring additional court-fee. In that case, the finding of the trial Judge was that the plaintiff's share in the partnership business would come to Rs. 32,000, based on the allegations contained in paragraph 14 of the plaint The High Court, after referring to the relevant paragraphs in the plaint in that suit, no doubt came to the conclusion that the valuation given by the plaintiff and the court-fee paid thereon were correct and ultimately allowed the revision. While doing so, the High Court has laid down—

> "When therefore the plaintiff purports to make an estimate in regard to what he would get on the taking of the accounts there would necessarily be an element of some guess or speculation. There is bound to be some kind of inaccuracy if one were to consider it in relation to the actual amount that would ultimately be found due. But if the estimate is on the face of it a sham one or so obviously wrong or if the other portions of the plaint make it clear that that is not the real estimate which the plaintiff himself had in mind it would be open to the Court to look at the plaint and ascertain what the real estimate is. But so long as there is no other averment in the plaint which renders the plaintiff's estimate a sham one or which shows that the estimate was some other amount the Court would be bound to accept the estimate as given by the plaintiff. Reality and not the accuracy is the test for ascertaining a proper valuation under section 36 (1)".

16. Applying the above principle laid down in *Parameswaran* v *Sarveswaran*[1]. We find from the averments made in the plaint in the present case that the estimate made by the plaintiff, on the face of it, is a sham one and is obviously wrong. The averments in the plaint make it clear that the valuation given is not the real estimate which the plaintiff himself had in mind. No doubt, the suit in the above decision was for dissolution of partnership, wherein the court-fee was computed as per section 36 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. The present suit is one for accounts and the court-fee has to be paid as per section 35 of the Act. But in both these sections, it is stated that the fee shall be computed on the amount as per the estimate made in the plaint. Hence, in all fours, the principle in the above decision will apply to the present case.

1. (1960) 1 M.L.J. 468: A.I.R. 1960 Mad. 260.

17. In *State* v. *L. Tota Ram*[1], a Bench of the Jammu and Kashmir High Court dealt with section 7 (*iv*) (*j*) of the Indian Court-fees Act VII of 1870, which states—

> "7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:
>
> (*iv*) In suits—
>
> (*j*) for accounts—
>
> according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In all such suits the plaintiff shall state the amount at whic he values the relief sought."

The Bench of the Jammu and Kashmir High Court dealing with the appeal filed against the preliminary decree passed in the suit for accounts, took up for consideration the question as to whether the valuation fixed for the purpose of court-fee and jurisdiction by the plaintiff was wrong. The very same question had been discussed by the District Judge, and the District Judge held that the valuation given by the plaintiff was correct. The High Court, after observing:—

> "In this case the plaintiff on his own showing in the plaint had claimed Rs. 15,000 in paragraph 7, as charges for extra labour. In paragraph 9 of the plaint, Rs. 700 for felling of trees were claimed by the plaintiff and according to the trial Court he was entitled to the refund of Rs. 18,572-20. In addition, according to the plaintiff he had other claims against the department. If only the above-mentioned specified amounts or any two of them are added the valuation of the suit would exceed Rs. 20,000 or the minimum valuation that the plaintiff could place on the suit on the averments in the plaint must be above Rs. 15,700. Thus putting a fanciful valuation of Rs. 5,100 is not *bona fide* but sham, fanciful, arbitrary and unreasonable. Therefore, the finding on this issue returned by the learned District Judge is not correct,"

held that—

1. A.I.R. 1971 J. & K. 71.

"Although a plaintiff has got power to fix his valuation in a suit for accounts, he cannot do so by mentioning a fanciful amount, nor can he put a fictitious valuation. The Court has power to interfere in the valuation put by the plaintiff if the valuation made by him is arbitrary or unreasonable. Where it is evident that the plaintiff made no endeavour to estimate the relief sought and the value given has no proportion to the relief sought and is on the face of it sham, fanciful, arbitrary and unreasonable, the Court can ask the plaintiff to correct the valuation."

After so finding, the High Court of Jammu and Kashmir both on the question of court-fee and also on the question of maintainability, allowed the appeal directing the plaintiff to properly amend the suit if he so chose.

18. In *Kapurchand* v. *State Government of Madhya Pradesh*[1] Sinha, C.J. had occasion to deal with section 7 (*iv*) (*f*) of the Indian Court-fees Act (1870) and it was held:

"Under section 7 (*iv*) (*f*) in a suit for accounts, the plaintiff has to state the amount at which he values the reliefs sought and court-fee has to be paid on that amount. But that does not mean that it is open to a plaintiff to deliberately so under-estimate his claim as to deprive the defendant of his valuable right of appeal to the High Court. In that sense it is not only a matter of court-fees but it becomes a question of jurisdiction also. Where the plaintiffs really intended to obtain a decree for Rs. 11,675, they should value their claim approximating to that sum. But the plaintiffs cannot say that the approximate amount of their claim is Rs. 100 and value their plaint accordingly and pay court-fee thereon. This amounts to the abuse of the process of the Court."

After so finding, Sinha, C.J. stated—

"If the plaintiffs insist on their claim of Rs. 11,000 and odd, they must amend their plaint accordingly and then the case will have to be tried by a Court of competent jurisdiction. The plaint will have to be returned for presentation to the proper Court."

1. A.I.R. 1954 Nag. 1?.

19. In *Kashinath* v. *Tukaram*,[1] a Division Bench of the Nagpur High Court dealing with section 7 (*iv*) (*f*) of the Indian Court-fees Act (1870) has stated—

"In a suit for accounts under section 7 (*iv*) (*f*), Court-fees Act, the Court can go behind the tentative valuation put by the plaintiff on the ground that such valuation is grossly unfair and arbitrary and on correct valuation return the plaint for presentation to the proper Court. The plaintiff in a suit for accounts cannot put any valuation of his choice on his claim without any check from the Court. Having regard to the provisions in the Code of Civil Procedure, no such untrammelled right can be said to exist with the plaintiff and the Court cannot lose sight of two considerations, jurisdiction and the right of appeal which turn on the valuation of the claim. In a case falling under section 7 (*iv*) (*f*) Court-fees Act it is usually difficult for the plaintiff to state precisely the amount which he is likely to obtain after accounts are taken, and it is not easy for the Court to say that the plaintiff had undervalued the relief sought.

But when it is evident that the plaintiff made no endeavour to estimate the relief sought and the value given bears no proportion to the relief sought and is arbitrary, the Court can under Order 7, rules 10 and 11, Civil Procedure Code ask plaintiff to correct the valuation and make good the deficiency in court-fees, and on his failure to do so reject the plaint if on a proper valuation the suit is still within the pecuniary jurisdiction of the Court or if it exceeds the pecuniary jurisdiction of the Court to return the plaint for presentation to the proper Court. But the power must be exercised with proper appreciation of the plaintiff's difficulty and with due regard to the right given to him by the legislature to value the claim for the purpose of Court-fees".

The Division Bench further stated—

"In considering the question of correct valuation the Court is not confined to what appears in the plaint but it is open to it to rely upon admissions by the plaintiff even in interlocutory matters in the suit."

20. *Lal Bijai Saran* v. *Chandra Bahadur*[2] arose out of a suit for dissolution of partnership and

1. A.I.R. 1956 Nag. 195.
2. A.I.R. 1957 All. 754.

for accounts. Under section 7 (*iv*) (*b*) of the Uttar Pradesh Act, the plaintiff is required to state the approximate amount due to him. The Allahabad High Court has held that it will not do for the plaintiff to merely value his suit for purpose of payment of court-fee at a certain figure. The High Court observed that it is not necessary for the Munsif to enter into detailed investigation at this stage and that the allegations in the plaint alone should be taken into consideration for fixing the approximate value of the suit.

21. In *Om Prakash* v. *Maya Ram*[1], a Division Bench of the Allahabad High Court had occasion to deal with section 7 (*iv*) (*b*) of the Uttar Pradesh Court-fees Act, which is the provision for computation of court-fee payable in a suit for accounts. The second proviso to section (*iv*) (*b*) as amended by Uttar Pradesh Court-fees (Amendment) Act, 1938, mentions that valuation shall be the approximate sum due to the plaintiff according to the allegations in the plaint. In that decision it is stated that—

> "The word 'approximate' occurring in the proviso to the said section means very near, closely resembling or fairly correct. Therefore, when the plaintiff is required to put down an approximate valuation of the suit it means that the valuation is as nearly as may be, the sum in respect of which he seeks relief in the suit. If it is possible to ascertain the approximate valuation, on the basis of the allegations made in the plaint, then the plaintiff cannot be allowed to put down a fictitious value for the purpose of jurisdiction."

Proceeding further, the Allahabad High Court has observed:

> "The averments made by the plaintiff in his plaint clearly go to show that he was claiming a sum of Rs. 17,000 and odd by way of his contribution towards the capital of the firm, besides profits which according to him had been earned by the partnership during its continuance. In the present case, therefore, there was no difficulty in ascertaining the approximate valuation of the suit having regard to the relief claimed in the suit...."

The Allahabad High Court, in the above said decision, has further observed:—

1. A.I.R. 1964 All. 430.

> "In a case where the plaintiff has clearly stated that a particular sum is due to him from the partnership firm and it is alleged that the said partnership had earned profits in the course of its business, the plaintiff cannot be allowed to put an arbitrary or fictitious valuation on the suit for the purpose of jurisdiction .... If *prima facie* the allegations in the plaint disclose that the Court has no jurisdiction to grant the relief claimed in the suit and the plaintiff has deliberately under-valued the suit, the Court would have no option but to return the plaint for presentation to the proper Court."

On the facts of that case, the Division Bench came to the conclusion that they were satisfied that in that case the plaintiff had deliberately under-valued his claim in order to give jurisdiction to the Munsif to entertain the suit and that the plaintiff could not be allowed to do that merely to escape the payment of court-fee.

22. The decision reported in *Mohd. Ajmal* v. *Indian Chemical Co*[1]. states.......

> "Though in a suit for accounts the plaintiff has to a certain extent been given the liberty of paying court-fee on the amoun, at which he valued the relief in the plaint this discretion is not absolute. He is required to value the suit according to the approximate sum due to him. It is not open to a plaintiff to arbitrarily value the relief claimed by him and to pay Court-fee. If the Court can discover from the plaint or material furnished by the plaintiff himself that the valuation given by the plaintiff is unacceptable being inaccurate and arbitrary, it has the power to direct the plaintiff to amend his plaint or take the risk of its being rejected in the event of non-compliance. The principle is that ordinarily the valuation given by the plaintiff has to be accepted and it is not open to the Court to enter into a detailed enquiry at the initial stage on the basis of the pleas put forward by the defendant. It is the function of the Court to apply its mind as to whether the valuation in the suit is correct or incorrect not only on the basis of allegations contained in the plaint but also taking into account other materials furnished by the plaintiff himself at the stage when the preliminary question comes

1. A.I.R. 1978 All. 21.

up for consideration as to whether, the suit is under-valued or not and whether the court-fees paid is sufficient or insufficient. If the plaintiff himself provides the Court material on the basis of which the Court without any detailed enquiry could arrive at the conclusion that the valuation disclosed by the plaintiff in the plaint is incorrect and arbitrary, it is not only open to the Court but it is its duty to hold so and to direct the plaintiff to amend the plaint accordingly. If for instance during examination of the plaintiff under Order 10, rule 2, Civil Procedure Code material comes on record showing that the valuation disclosed by the plaintiff in the plaint is incorrect, the Court would not only be justified but would be bound to direct the plaintiff to amend his plaint disclosing the correct valuation."

23. Considering the decisions referred to above, we are of the view that the words "as estimated in the plaint" occurring in the Madras Court fees and Suits Valuation Act, 1955 are analogous to the words "approximate value" in the Uttar Pradesh Court-fees Act. This view is fortified by the meaning given in the Shorter Oxford Dictionary for the word 'estimate as:—"Estimate—approximate calculation made on the probabilities". We have already observed that the language employed in section 35 and section 36 of the Tamil Nadu Court fees Act is more or less the same.

24. Mr. Kesava Iyengar, the learned counsel for the appellant, was not able to counter the principles laid down in the decisions referred to above. He simply stated that the power given under section 35 for the plaintiff to estimate the value is absolute and the valuation given by the plaintiff cannot be questioned either at that stage or at the appellate stage. The learned counsel further submitted that there is no question of jurisdiction as such involved in this case and the mere fact that the suit has been undervalued cannot give this Court power to direct the plaintiff to pay the proper court-fee after estimating the amount sued for. Mr. Kesava Iyengar further stated that in any case the plaintiff will be directed to pay the court-fees, if ultimately the Court finds that the amount payable to the plaintiff on taking of accounts is much more than the amount at which it was estimated.

25. We are not able to appreciate the arguments of Mr. Kesava Iyengar. In the first place, if this Court comes to the conclusion that the estimate made by the plaintiff in the plaint is not honest and does not give the approximate amount he claims on taking of accounts, there is no gainsaying that court-fee will be paid ultimately if the decree is given for a larger amount. The payment of court-fee after honestly estimating the value of the suit is a must, and the party should not be allowed to estimate the value of the suit in a sham, nominal, arbitrary and dishonest manner.

26 The decision cited by Mr. Kesava Iyengar reported in *Rathnavarmaraj* v. *Smt. Vimala*[1] deals with the right of the defendant to question by way of revision to the High Court under section 115, Civil Procedure Code, the decision on court-fee given by the trial Court. On the court fee issue it ultimately held that the revision filed by a defendant against the order of the trial Court regarding the decision rendered by it on the question of court-fee payable by the plaintiff is not maintainable. The Supreme Court in that case had occasion only to deal with section 12 (2) of the Tamil Nadu Court-fees and Suits Valuation Act and there is absolutely no reference to sub-section (4) of section 12. We do not think this decision in any way helps the appellant.

27. The next case cited by Mr. Kesava Iyengar is the one reported in *Rachappasubrao* v. *Shidappa Venkatrao*[2] wherein the Privy Council had occasion to deal with section 12 of the Madras Court-fees Act. In that case, the Privy Council no doubt approved the decision of the High Court which rejected the plea of the defendant at the appellate stage regarding sufficiency of the court-fee paid on the plaint. In that decision, the Privy Council has observed:

> "The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by section 12, which makes the decision of the First Court as to value final as between the parties, and enables a Court of appeal to correct any error as to this, only where the First Court decided to the detriment of the revenue. The defendant in this suit seeks to utilise the provisions of the Act, not to safeguard the interests of the State, but to obstruct the plaintiff; he does not

1. (1962) 1 S.C.J. 60: (1962) 1 M.L.J. (S.C.) 36: (1962) 1 An.W.R. (S.C.) 36: (1961) 3 S.C.R. 1015: A.I.R. 1961 S.C. 1299.

2. (1919) I.L.R. 43 Bom 507.

contend that the Court wrongly decided to the detriment of the revenue, but that it dealth with the case without jurisdiction."

It is clear from the abovesaid observations made by the Privy Council that the Court has power under section 12 to look into the valuation to see whether it is detrimental to the revenue of the State. In the present case, there was no appeal or revision against the finding of the trial Court on the issue relating to court-fee. It is only brought to our notice by the learned counsel for the defendant that the estimate made by the plaintiff-appellant for the purpose of paying the court-fee is sham, nominal, arbitrary and dishonest even on the very allegations made in the plaint.

28. Nobody can be allowed to litigate without paying the proper court-fee, except in the case where the plaintiff sues as a pauper. If the estimate made by the plaintiff, is sham, nominal and dishonest, the Court has power to direct the plaintiff to pay the proper court-fee after valuing his claim properly. Such valuation of the plaintiff's claim must no doubt be based on the plaint allegations and also on the averments made by him in interlocutory applications made on the strength of the plaint. The litigant cannot be allowed to say that he will be paying additional court-fee or deficit court-fee once the decision is rendered by the Court regarding the actual amount he will be getting on taking of accounts. In such cases if the plaintiff fails in the suit, or in the appeal, he will go scotfree without paying the deficit court-fee, even though he is legally liable to pay such court-fee at the time of filing the suit or the appeal. It will be detrimental to the revenue of the State. As such we are not in a position to appreciate the argument of Mr. Kesava Iyengar to the effect that ultimately the plaintiff has to pay the court-fee on the amount decreed if it is larger than the amount estimated in the plaint.

29. Mr. Kesava Iyengar cited the decision reported in *Sathappa Chettiar* v. *Ramanathan Chettiar*[1] in support of his argument. That decision deals with section 7 (*iv*) (*a*) to (*f*) of the Court-fees Act, 1870, and also section 12 (2) of the same Act. After observing that there is no finality reached as regards the court-fee payable by virtue of section 5 of the Indian Court-fees Act, the Supreme Court held that it was open to the Division Bench to consider the correctness of the view taken by the learned Chamber Judge and that as they were satisfied that the plaint did not fall under Article 17-B of Schedule II, they were entitled to pass appropriate orders under section 12 (1) and 12 (2) of the Act. The Supreme Court further held that under section 7 (*iv*)(*b*) the amount of fee payable in a suit for accounts is according to the amount at which the relief sought is valued in the plaint or memorandum of appeal and in all such suits the plaintiff shall state the amount at which he values the relief sought. On this basis, the Supreme Court further held that the plaintiff has the right to state his value in the plaint and this will govern the jurisdiction and as such the amendment sought for, *viz.*, the amount specified for jurisdiction as Rs. 15 lakhs be amended as Rs. 50,000 has to be allowed. In that case, the plaintiff valued the suit for purposes of Court-fee at Rs. 50,000. Section 7 (*iv*) (*f*) of the Indian Court-fees Act, 1870 deals with Court-fee payable in suits for accounts and as to how such suits should be valued. Its corresponding provision is section 35 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, which deals with Court-fee payable on suits for accounts, and it is stated therein that in a suit for accounts, fee should be computed on the amount sued for as estimated in the plaint. Therefore, the above decision of the Supreme Court will not be helpful in deciding the point at issue in the present case which has to be decided in conformity with the provisions of section 35 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955.

30. The abovesaid decision of the Supreme Court and the decisions in In re *Venkatanandam*[1] and *Sathappa Chettiar* v. *Ramanathan Chettiar*,[2] wherein reference is made to *Ramayya* v. *Ramaswami*[3] and *Narayana* v. *Periappan*,[4] are cases falling under section 7 (*iv*) of the Indian Court-fees Act, 1870. Apart from the fact that the decisions and discussions made therein do not apply to the facts of the present case and the issue directly involved in this case, those cases were in relation to the inter-

1. 1958 S.C.J. 407: 1958 S.C.R. 1021: (1958) 1 An W.R. (S.C.) 148: (1958) 1 M.L.J. (S.C.) 148: A.I.R. 1958 S.C. 245.

1. (1933) 64 M.L.J. 122: I.L.R. 56 Mad. 705: 37 L.W. 106: A.I.R. 1933 Mad. 330.

2. (1955) 2 M.L.J. 408: A.I.R. 1955 Mad. 682: 68 L.W. 659.

3. (1913) 24 M.L.J. 233.

4. I.L.R. (1938) Mad. 1031: (1938) 2 M.L.J. 557: 48 L.W. 454: A.I.R. 1938 Mad. 887.

pretation of section 7 (*iv*) of the Indian Court-fees Act as it then stood. Further these decisions referred to above never considered cases wherein the value stated by the plaintiff on the face of it was sham, nominal, arbitrary and dishonest. Section 7 (*iv*) of the 1870 Act clearly gives the right to a plaintiff to value the relief in his plaint and gives a complete discretion to the plaintiff in the suits enumerated under section 7 (*iv*) (*a*) to (*f*) of that Act in the matter of valuing the relief. But such discretion given to the plaintiff, in our view, should be used without detriment to the revenue of the State. The discretion exercised must be honest and not sham, nominal, arbitrary or dishonest. The provision that governs suits for accounts in the Tamil Nadu Court-fees and Suits Valuation Act, 1955, is section 35, and that, for suits for dissolution of partnership is section 36. In both these sections, we find the expression that the fee shall be computed on the amount sued for as estimated in the plaint. The word "estimated" occurring in these sections does not find place in section 7 (*iv*) of the old Court-fees Act of 1870. We have in the beginning of this judgment discussed about the word 'estimate' and the decisions rendered in the light of sections 35 and 36 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. According to the present section, the plaintiff should estimate his claim approximately. Such estimate should not be sham, nominal, arbitrary and dishonest No doubt the Court's power is limited only to ascertain the plaintiff's estimate of the amount due to him from the allegations in the plaint, and it cannot substitute its own estimate. If the estimate given by the plaintiff is on the face of it sham or obviously wrong, the Court can ask the plaintiff to make a proper estimate of his claim. In the light of the wordings in sections 35 and 36 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, and the discussion made in paragraphs supra, we do not think the abovesaid decisions relied upon Mr. Kesava Iyengar will have any application to the facts of the present case.

31. The decisions cited by Mr. Kesava Iyengar, in our opinion have not touched the provisions contained in section 12 (4) of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, and have not stated anything against the principles laid down in *Parameswaran* v. *Sarveswaran*,[1] *State* v. *L. Tota Ram*,[2] *Kapurchand* v. *State Government of Madhya Pradesh*,[1] *Kashinath* v. *Takaram*,[2] *Lal Bijai Suran* v. *Chandra Bahadur*,[3] *Om Prakash* v. *Maya Ram*,[4] and *Mohd. Ajmal* v. *Indian Chemical Co.*[5].

32. From the above discussion it follows that section 13 (4) of the Tamil Nadu Court-fees and Suits Valuation Act, extracted already in the foregoing paragraphs, will squarely apply to the facts of the present case. The Court has power under the said section to consider the correctness of any order passed by the trial Court affecting the fee payable on the plaint, either *suo motu* or on the application of any of the parties. We have perused the order of the trial Court on the court-fee issue. The plaint, as discussed supra, makes it clear that apart from the money which the defendant is liable to pay the plaintiff as agent of the plaintiff, the plaintiff has quantified the amount at Rs. 9,74,598·35 as payable by the defendant to him. This is made clear by the allegations in paragraphs 6, 7, 8, and 9 of the plaint. The plaintiff ought to have valued the suit at about Rs. 9,74,598·35 which he has to get apart from the amounts received by the defendant on his behalf in the course of his agency as and from 22nd January, 1965.

33. The appellant, after the arguments on this aspect of the case was over filed C. M. P. No. 11929 of 1978 under Order 6, rule 17 read with section 151, Civil Procedure Code for amendment of the plaint by omitting the words—

(1) "and nothing more", occurring in para. 8;

(2) and pay the plaintiff the amounts that are still "with him less the amounts already paid" occurring in para 9; and

(3) "much more will be due" occurring in para 12. Even if those amendments are allowed, the plaint will still be for the recovery of Rs. 9,74,598-35 apart from the amounts received by the defendant on his behalf in the course of his agency as and from 22nd January, 1965. But, after considering the merits of the amendment petition, we have dismissed the same.

34. The appellant, who was the plaintiff before the Court below, has to value the suit

1. (1960) 1 M.L.J. 468: A.I.R. 1960 Mad. 260.
2. A.I.R. 1971 J. & K. 7 ;

1. A.I.R. 1954 Nag. 48.
2. A.I.R. 1956 Nag. 195.
3. A.I.R. 1957 All. 754.
4. A.I.R. 1964 All. 430.
5. A.I.R. 1978 All. 21.

for the purpose of court-fee and jurisdiction at Rs. 9,74,598.35 and pay the deficit court-fee both on the plaint and on the memorandum of appeal on the basis of such valuation within six weeks from this date.

S.J. —— *Directions accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*T. Ramaprasada Rao and M.A. Sathar Sayeed, JJ.*

Fathima Bivi and others .. *Appellants**

v.

Bhavasa Maracair and others .. *Respondents.*

Mohammedan Law—Gift of equity of redemption by mortgagor—Whether valid.

Though ordinarily and in accordance with the literal understanding of the condition of hiba under the personal law of Muslims the delivery of possession which ordinarily would mean physical possession of the subject-matter of the gift is a condition precedent, yet, it has been consistently held that such possession which the subject-matter is susceptible of and capable of at the time when the *hiba* is made, if given, would be a valid substitute and equation for corporeal delivery or physical delivery of the subject-matter and even in such circumstances, the hiba would be a valid gift.

Delivery of possession if understood as the *sine qua non* under all circumstances of the subject-matter of the gift, then, on such a wordy understanding of one of the terms of the hiba, a gift of equity of redemption would be hit by the principle underlying it. The Judicial Committee has observed that taking possession of the subject-matter of the gift by the donee either actually or constructively was sufficient to complete the gift. Sufficient inroads were made in very early times into the necessity to deliver physical possession of the subject-matter of the gift in order to make it a valid gift. Equity made a sufficient dent upon the necessity to deliver physical possession of properties in order to make a complete and valid gift. Therefore, it follows, that constructive possession of the subject-matter of the gift provided, it could be made out in a given case would be sufficient to make a *hiba* valid notwithstanding the fact that physical delivery of the same has not been given. It is only such possession as the subject-matter is capable of or susceptible of that could be thought of and once if such available possession is given by the donor to the donee and as a follow-up, the donee exercises rights of ownership over the property taken over by him, though constructively, that would be sufficient evidence to establish that there was a valid *hiba* as is known to Mohammedan Law. [*Para.* 12.]

Cases referred to:—

Tara Prasanna Sen v. *Shandi Bivi*, (1922) I.L.R. 49 Cal. 68; *Munni Bai* v. *Abdul Gani*, A.I R. 1959 M.P. 225.

Appeals against the decree of the Subordinate Judge, Chidambaram in Original Suit Nos. 43 of 1970 and 48 of 1973.

V. Ratnam, for Appellants.

R. Thillaivillalan, P. Sam, V. Harinathan and *R. Gnanagurswamy*, for Respondents 1 to 7.

K. Sarvabhauman and *K. Sampath* for Respondents 8 to 10.

The Judgment of the Court was delivered by *Ramaprasada Rao, J*:—As against a common judgment rendered by the learned Subordinate Judge of Chidambaram in two Original Suits tried by him collectively and numbered as O.S. No. 43 of 1970 and O.S. No. 48 of 1973 on his file, the above appeals arise.

2. We shall here deal with substantive rights as between the sharers in the estate of one Abdul Azeez Maracair who died in the year, 1962. He married, according to the plaintiffs, only twice, but according to others, thrice. The plaintiffs are the sons and daughter of Abdul Azeez Maracair (hereinafter referred to as Azeez) through his second wife. The first defendant is his first wife. The sixth defendant whose marriage with Azeez is disputed is the third wife. The 7th and 8th defendants are the son and daughter respectively of Azeez through the third wife and defendants 9 to 11 are the sons of the second wife through her earlier marriage with another person. Defendants 2 to 5 are admittedly the predecessors of the plaintiffs' share in the estate of Azeez in so far as suit items 7, 8 and 10 are concerned. The case of the plaintiffs is that the 6th defendant is not a lawfully wedded third wife of Azeez and in consequence,

*Appeal Nos. 358 and 550 of 1974, etc.

12th April, 1978.

defendants 7 and 8, though impleaded as parties formally to this litigation, are not entitled to any share in the estate of Azeez. They would also contend that defendants 9 to 11 are not entitled to any share even as heirs of their mother who was the second wife of Azeez and who is also the mother of the plaintiffs. It was in those circumstances that they came to Court with a suit for partition and separate possession of their 15/16th share in 13 items of property, which according to them belonged to Azeez. In so far as this part of the litigation is concerned, as we stated already, apart from the controversy as to the properties to which Azeez was entitled to on the date of his death, the question which has to be decided in the first instance, so as to hurdle over and mop up certain inconvenient situations regarding the number of sharers and their entitlement is whether the sixth defendant was the lawfully wedded wife of Azeez. The case of the 6th defendant was that she was such a wife and defendants 7 nnd 8 are the heirs of Azeez along with others and they are the children born to her through Azeez. We shall, therefore, restrict this part of our judgment for the consideration of the question whether the sixth defendant could be said to be the lawfully wedded wife of Azeez. In fact, A.S. No. 550 of 1974 is an independent appeal by defendants 6 to 8 as against the finding of the Court below that the sixth defendant was not truly and lawfully wedded to Azeez. The Court below would not believe the oral and documentary evidence let in by the 6th defendant to support her claim that she did marry Azeez in accordance with the personal law of the parties and that the 7th and 8th defendants are her children born through him. As against those findings, the present appeal has been filed.

3. In the trial Court, the main contention of the plaintiffs was that the 6th defendant was already married at or about the time when she contracted intimacy with Azeez and in the absence of a *talak* as between her and her prior husband in a manner known to law, there could not have been a lawful wedlock as between her and Azeez and that therefore, defendants 7 and 8 cannot be understood and treated as the heirs of Azeez entitled to share in his estate. We may at once state that before us, plaintiffs and defendants 2 to 5 who, to use a loose expression 'the successors-in-interest', purchased certain suit items are not represented. Mr. Thillaivillalan filed his vakalat for the plaintiffs as well as defendants 2 to 5. But though the appeal was in the list for several days, he has not appearedt nor has he made any arrangement otherwise. The appeals came up for hearing yesterday and again continued today and even then, there is no representation. We had to, therefore, call the plaintiffs and defendants 2 to 5 in open Court and set them as absent. Later counsel appeared.

4. In the above context of events, we have to see whether the story of the plaintiffs that the 6th defendant is not the lawfully weded wife of Azeez is true or whether the contention of defendants 6, 7, 8 and the aggrieved persons that the 6th defendant is a lawfully wedded wife and defendants 7 and 8 are the children of Azeez is true.

5. **Both parties on either side agree that the 6th defendant was a married woman prior to her marriage with Azeez. The question, therefore, resolves itself simply to one of fact whether there is acceptable proof that at or about the time when the 6th defendant contracted** marriage with Azeez, there was a divorce as between herself and her previous husband. In order to establish that there was such a *talak*, as it is known in the personal law of the parties, defendants 6 to 8 who are the appellants in A.S. No. 550 of 1974, who will hereinafter be referred to as appellants, filed Exhibits B-5, B-7, B-8 and B-10 to prove their case. Exhibit B-5 is an application made by the first plaintiff to the Kazi of the area asking for a copy of the *talaknama* which ought to have been recorded at or about the time when the prior husband of the sixth defendant divorced her. There is an endorsement in Exhibit B-5 itself to show that the first plaintiff received a copy of the said *talaknama*. The first plaintiff was examined as P.W. 2. When he was confronted with Exhibit B-5, he admits that it bears his signature at two places. When he was further confronted with the writing over the second signature of his, he would prevaricate and say "சூழ்ச்சி செய்து இருக்கிறார்." We are not able to accept the first plaintiff as a true witness. When he had the opportunity to examine the document Exhibit B-5 in Court, he could have in the first instance stated that there was no writing over his second signature and that it was an interpolation. But when he was confronted specifically about the said writing over the second signature of his, he would weave out a story that something wrong has happened. This is not all. Exhibit B-10 was produced by the appellants even at the trial stage. This is a copy of the *talaknama* pronounced by the prior husband of the 6th defendant which copy was issued by the Assistant

Kazi examined as D.W. 3. D.W. 3 would say that he issued Exhibit B-10 which is a copy of the *talaknama* and confirmed that there was a divorce between the earlier husband of the 6th defendant and herself. The learned trial Judge would not rely upon Exhibit B-10 presumably for the reason that it was only a copy issued by the Assistant Kazi and that he had no authority to issue such copies. We are not satisfied that the Assistant Kazi has no such authority to issue copies of official records kept by the Kazi in his office. No definite interdict which would prevent the Assistant Kazi from issuing such copies has been referred to by the lower Court. Even otherwise, before us, the appellants have produced the original of Exhibit B-10. It is marked as Exhibit C-1 after we allowed the petition by the appellants, namely, C.M.P. No. 399 of 1978 for filing additional documents in this Court. There is a writing in Exhibit C-1 in Urudu. That is the signature of the Kazi. It would be difficult to produce a document of 1947 containing the signature of a Kazi and that too in Urudu late in 1978. The respondents though absent, and even after appearance by counsel did not lay any material before us to suspect the *bona fides* of Exhibit C-1. We compared Exhibit C-1 with Exhibit B-10 and they are similar in all respects. Having regard to the writing in Exhibit C-1, the age of the paper in which it has been written and in the absence of suspicious circumstances surrounding the other document, we are of the view that Exhibit B-10 is admissible because Exhibit C-1, its original has been produced. Again, we have the uncanny acknowledgement of legitimacy of the child, the seventh defendant by Azeez himself under Exhibit B-8. He has also referred to the sixth defendant as his lawfully wedded third wife, in Exhibit B-7. Though the recitals in Exhibits B-7 and B-8 by themselves may not prove the earlier *talak* between the 6th defendant and her prior husband, yet, these documents taken in conjunction with Exhibits B-5, B-10 or C-1 and in the light of the evidenee of the first plaintiff himself and particularly for the reason that the first plaintiff applied for a copy of the *talaknama* as is seen from Exhibit B-5 wherein he says:

"விவாகரத்து சம்மந்தமாய் தங்களுக்கு வந்த ஆதாரத்தின் நகல் காப்பியும் ஷ ஆதாரத்தைக் கொண்டு தாங்கள் பஸக் செய்திருந்தாலோ, அல்லது வேறு எந்த விதமான விவாகரத்து செய்திருந்தாலோ அதற்கு காப்பியும்"

would itself probabilise the case of the appellants that the plaintiffs knew that there was a *talak* pronounced by the previous husband of the 6th defendant. The learned Judge rejected Exhibit B-10, as already stated, for the reason that it was only a copy. But while dealing with Exhibit B-5, he noted that the first plaintiff examined as P.W. 2 admitted that he has signed Exhibit B-5 at two places. He would add that P.W. 2 claimed that he does not knew who has written the line over his second signature. This insipid explanation of P.W. 2 in the witness box does not appeal to us. When he admitted that there was one undisputed signature in Ex. B-5 and when he does not spin out a story regarding the contents over and above his first signature, then the first plaintiff cannot escape the comment made by the appellants that he did apply under Exhibit B-5 for a copy of the *talaknama*. He did not approach the Kazi for the fancy of it; but on the other hand, he sought for a copy of the *talaknama* and the connected records. This would imply that he knew that there was a *talak*. In these circumstances, we are of the view that there was a prior pronouncement of *talak* of the marriage as between the 6th defendant and her previous husband and that she was free at or about the time when she married Azeez. One thing that was put against the 6th defendant was that a child was born to her two months after the date of her marriage with Azeez. According to the 6th defendant, this was the child which she bore to her prior husband and that child died. In the absence of any further particulars to disbelieve this version of the 6th defendant and in the light of Exhibit B-5 coupled with his conduct, we are of the view that the finding of the learned Judge that there was no divorce as between the 6th defendant and her prior husband cannot be accepted. The judgment in so far as it finds that the 6th defendant is not the lawfully wedded wife of Azeez is, therefore, set aside.

6. We shall now pass on to A.S. No 358 of 1974. Having thus rendered our views in A.S. No. 550 of 1974 and having expressed ourselves as to who could be the sharers to the estate of Azeez, we now proceed to deal with another controversy regarding certain specific items of the plaint schedule properties. *Inter alia*, the problem is whether items 1 and 7 to 10 in the plaint schedule are partible properties in which the plaintiffs together can as a matter of course be entitled to their 15/16th share therein. It is not disputed before us that if the above items too formed part and parcel of Azeez's estate, then the plaintiffs' claim for entitlement to their legitimate share

therein would be unassailable. The Court found that items 1 and 7 to 10 do form part of the estate of Azeez. Before us, the first defendant as the appellant challenges the said finding. We shall, therefore, take up the relevant material before us to consider whether the ultimate conclusion of the Court below is correct.

7. We shall now deal with item-1. Item 1, as would be seen hereinafter, consists of a house and a site around it The Court below held that the first defendant was entitled to a 3/5th of the site and 3/5th of the house and decreed accordingly. But the first defendant's claim is that she would be entitled to the entirety of the site and she has obviously no quarrel over the finding that she was entitled to the 3/5th share in the superstructure. The question is whether the appellant is entitled to the entirety of the site.

8. We shall deal with the other question whether the 2/5th of the superstructure which admittedly belonged to Azeez was removed by him and that the superstrncture as it stands entirely belongs to the appellants or not. Item 1 is equatable to item 131 in an earlier suit between strangers to this litigation. Though the learned Judge felt some difficulty in identifying item 131 in the other suit which we shall presently refer to with item 1 in the present suit, we do not find any such difficulty as the descriptions of the property as given in the earlier proceedings do tally in material particulars with item 1 of the suit schedule. In fact, it is by now established that boundaries prevail over the area and if there is identity in two different instruments regarding the boundaries of a property, then there is little difficulty in accepting that the two properties which are the subject-matter of independent descriptions in the two instruments as above are one and the same. That has happened in this case. We have compared the boundaries of item 131 in the earlier suit with item 1 in the present suit. They are similar and we, therefore, find that the earlier item 131 is the same as item 1 in the present suit.

9. What is this item 131 in the suit is the next question. In O.S. No. 43 of 1944 on the file of the Subordinate Judge of Cuddalore there was an earlier litigation with which we are not materially concerned. But in so far as the matter in question is concerned, we wish to refer to the earlier suit O. S. 43 of 1944 (hereinafter referred to as the earlier suit) for the purpose of identity of the property with item 1 in the present action. Under Ex. B-31 a memo of compromise was filed in Court in the earlier suit under which item 131 was allotted to one Hamid Bi, the plaintiff in that suit. What was allotted to her was a ground in item 131, the compound walls and two sites and the entire northern and southern walls of the house including the well and trees standing on the suit *site*. In the same exhibit, the building and the entire superstructure in item 131 were treated separately and in case it became necessary that the said building and the superstructure in item 131 had to be sold, then the sale procceds should be divided amongst the plaintiff, the first defendant and the second defendant in the proportion of 1/5th, 2/5th and 2/5th respectively. A fair reading of Exhibit B-31 is enough to rationally opine that the subject-matter of item 131 in the earlier suit was not only a vacant site but also a superstructure which was obviously in a portion of it. In order to set at naught any controversy about the understanding of the content of item 131 in the earlier suit, the learned counsel for the appellant filed C.M.P. No. 14853 of 1977 and wanted leave to file additional document. The document now sought to be produced is the extract of the suit register itself. In this, there is again the repetition of the clause contained in the memo. of compromise which has already been referred to. The trial Judge was of the view that as Exhibit B-31 was only a memorandum of compromise, it would be difficult in the absence of any other corroborative evidence to accept the recitals therein. Mr. Ratnam, the learned counsel for the appellant, in order to place the subject-matter beyond controversy has sought for leave to file this additional document in C.M.P. No. 14853 of 1977. In order to render justice we have allowed the said application. We have perused the suit register Exhibit C. 3, compared it with Exhibit B-31 and we are satisfied that item 131 in the earlier suit consisted of not only a site but also a superstructure. It is clear from the recitals in Exhibit B-31 read with Exhibit C-3 that the entire site which formed part of item 1 of the suit schedule together with a 1/5th share in the superstructure therein was allotted to Hamid Bi. Thereafter, this property was the subject-matter of three more registered documents. Under Exhibit A-11, dated 14th June, 1949, Azeez exchanges some of his properties in favour of the second defendant in the earlier suit and

obtains in turn a 2/5th right in the superstructure. Exhibit B-32 dated 25th June, 1949 is yet another document to show that the first defendant purchased 2/5th share in the superstructure from the first defendant in the earlier suit. Under Exhibit B-33 dated 22nd April, 1950, the plaintiff in the earlier suit sold the entire site and her 1/5th share to the first defendant. The cumulative effect of Exs. A-11, B-32 and B-33 is that the first defendant became the owner of the entirety of the site and also the owner of a 3/5th share in the superstructure. In the light of such disclosures made, we are unable to agree with the learned Judge that the first defendant is entitled to 3/5th of the site only. Though the first defendant would rather put her case high by stating that 2/5th of the superstructure which admittedly belonged to Azeez, who got it under Ex. A-11, was removed by him, yet, Mr. Ratnam is unable to lay his hands upon any clinching material to substantiate the appellant's case. The result of it is that the first defendant would, therefore, be declared to be entitled to the entirety of the site and 3/5th of the superstructure and what would be available for the purpose of division amongst the heirs of Azeez would be the 2/5th share in the superstructure as above. To this extent, the judgment of the Court below is modified.

10. We now come to item 7 to 10. There is no dispute that at all material times, this property formed part of the estate of Azeez. Under Exhibit B-1 dated 12th March, 1957 this property was usufructuarily mortgaged by Azeez in favour of the father of the 4th and 5th defendants. The first defendant's case is that Azeez gifted over this property when it was subject to such a usufructuary mortgage and there was also a contemporaneous direction, though orally, that the first defendant pursuant to the said *hiba* should discharge the prior usufructuary mortgage. It is not in dispute in this case that the earlier usufructuary mortgage was discharged by the first defendant. This is seen from the endorsement in Exhibit B-1 which clearly makes out such a conduct on the part of the first defendant. This is proof positive that the first defendant acted upon the gift. There is also evidence which no doubt is posterior to the time of the gift as above to show that the first defendant was publicly and openly recognised as the owner of the property which was the subject-matter of the gift as above. The chitta extract Ex B-11 as also the kist receipts Exs. B-12 to B-23 taken one in conjunction with the other do really reflect upon the indefeasible right of the first defendant to the above items of property. She was openly claiming the properties as fully owner thereof. We have already seen that she acted upon the gift by discharging the usufructuary mortgage. She further asserted her title to the properties by altering in the mutation proceedings, the name of the earlier owner and continued to exercise rights of ownership therein by paying public dues thereon. The learned trial Judge was of the view that in the absence of a written instrument evidencing *hiba*, which according to him was the usual mode by which Azeez was gifting properties to his kith and kin and as the mutation proceedings were effected, according to the learned Judge, after the death of Azeez, and the kist was paid only after 1966 when Azeez died, it cannot be surely and certainly said that such conduct of the first defendant in paying public dues or securing her name as the registered owner of the property is a positive *indicia* of exercise of rights of ownership in the property. He would also hold the view that a *hiba* is not possible when at the time when the gift is made, physical possession of the property is not delivered to the donee by the donor. According to him, one of the essential elements to constitute a complete gift under the Muslim Law is physical and corporeal delivery of possession of the property and as such possession in the circumstances of the case is not possible, it cannot be said that there was a *hiba* within the meaning of the personal law of the parties and this by itself was sufficient, according to the learned Judge, to negative any title as claimed by the first defendant in items 7 to 10.

11. We shall take up the last contention first. Though ordinarily and in accordance with the literal understanding of the definition of *hiba* under the personal law of Muslims the delivery of possession which ordinarily would mean physical possession of the subject-matter of the gift is a condition precedent, yet, it has been consistently held that such possession which the subject-matter is susceptible of and capable of at the time when the *hiba* is made, if given would be a valid substitute and equation for corporeal delivery or physical delivery of the subject-matter and even in such circumstances, the *hiba* would be a valid gift.

12. At one time, there was a controversy whether a gift of an equity of redemption as in this case was valid at all. We have seen that the property was usufructuarily mortgaged

under Exhibit B-1. The first defendant's case is that it was gifted to her orally, which is possible under the Muslim law by her husband when the property was subject to the aforesaid mortgage with possession with the father of defendants 4 and 5. The question is whether a gift by a mortgagor of his equity of redemption is possible at all. As we said, delivery of possession, if understood as the *sine qua non* under all circumstances, of the subject-matter of the gift, then, on such a wordy understanding of one of the terms of a *hiba*, such a gift would be hit by the principle underlying it. But as observed by the Judicial Committee, taking possession of the subject-matter of the gift by the donee either actually or constructively is sufficient to complete the gift. Therefore, sufficient inroads were made in very early times into the necessity to deliver physical possession of the subject-matter of gift in order to make it a valid gift. The Bombay High Court, however, took a different view that a gift of equity of redemption where the mortgagee is in possession of the mortgaged property at the date of the gift is not valid. Many of the High Courts in our country took a different view. It appears that even the Bombay High Court watered down their earlier strict view of the position as is seen from the illustration given by the author Mulla in the eighteenth edition of the Principles of Mahomedan Law at page 154. The illustration runs as follows:—

> "*A* owns six immovable properties. He mortgages three with possession to *M*. He then makes a gift of all the six properties to *D* and puts him in possession of the three properties not mortgaged to *M*. The High Court of Bombay has held that in such a case the gift of all the six properties is valid..."

This puritanic view of the Bombay High Court itself is no longer the view of that High Court. Further, a Division Bench of the Calcutta High Court stated in *Para Prasanna Sen* v. *Shandi Bibi*[1].

> "In British Courts the Mahomedan Law of Gift is administered as between Mahomedans on the ground of equity and good conscience...."

Therefore, equity made a sufficient dent upon the necessity to deliver physical possession of properties in order to make a complete and valid gift. The learned Judges in the said decision continued to say:

> "...We are of the opinion that the right of the equity of redemption which is under consideration in this case and such similar rights which are termed in some of the decided cases as incorporeal rights, as distinguished from the corpus, may, in view of the exigencies and necessities of modern conditions and conception of legal rights of property, be subjects of a valid gift, the mode of delivery of possession varying according to the nature of the right conveyed".

13. Hidayatullah, C.J., as he then was in *Munni* v. *Bai Abdul Gani*.[1] in his usual style made the following observations:

> "....three conditions which are necessary for a valid gift under the Muhammadan Law are: (1) manifestation of the wish to give on the part of the donor; (2) acceptance of the donee, either expresslly or impliedly and (3) taking of possession of the subject-matter of the gift by the donee, either actually or constructively...."

Dealing with the third aspect, the learned Chief Justice stated that delivery of possession can be made in such manner as the subject of the gift is susceptible of.

14. Another learned author Tyabji on Muslim Law, Fourth Edition at page 343 reiterated what the other author stated and added that possession of the equity of redemption of immovable property in the possession of a mortgage may be transferred by the donor giving to the mortgagee notice of his having conveyed to the donee the property subject to the mortgage and permitting the donee to exercise all acts of ownership that may be exercised by the owner of the equity redemption.

15. Therefore it follows that constructive possession of the subject-matter of the gift provided it could be made out in a given case would be sufficient to make a *hiba* valid notwithstanding the fact that physical delivery of the same has not been given. It is only such possession as the subject-matter is capable of or susceptible of that could be

1 (1922) I.L.R. 49 Cal. 68.

1. A.I.R. 1959 M.P. 225.

thought of and if once such available possession is given by the donor to the donee and as a follow-up, the donee exercises rights of ownership over the property taken over by him though constructively that would be sufficient evidence to establish that there was a valid *hiba* as is known in Mahomedan Law. We have no hesitation in accepting the contention of Mr. Ratnam that in the instant case, there is evidence not only by conduct but also by express intention and assertion of title over immoveable property by the first defendant for a considerable length of time that the *hiba* claimed by her from her husband is true and ought to be true. The mere fact that there is no instrument evidencing such a gift cannot be made much of as under the personal law of the parties, an oral gift is also possible. We are unable to agree with the uncharitable conclusion of the trial Judge that the kist receipts do not possibly show that they were paid before the death of Azeez. They do not establish that kists were paid only after his death. In any event, the discharge of the mortgage which is not in dispute and which was made by the first defendant coupled with her continuous conduct in dealing with the property which was in her constructive possession do, in our opinion, establish the *hiba*. We are, therefore, unable to agree with the Court below that items 7 to 10 are partible properties which are to be included and treated as the estate of Azeez. A.S. No. 358 of 1974 is, therefore, allowed.

16. In the earlier portion of our judgment, we have referred to the absence of Mr. Thillai Villalan, the learned counsel for the respondents in A. S. No. 358 of 1974 and A. S. No. 550 of 1974. The learned counsel appeared today before us and made certain representations in connection with the facts, circumstances and the documents already on record in the above two appeals, so as to sustain the judgment of the trial Court. We once again heard counsel and in this behalf, therefore, our earlier observations that the appeal was heard in the absence of the contesting respondents cannot survive and does not. Even after hearing Mr. Thillai Villalan, we are not persuaded to change our view and our conclusions arrived at already in the two appeals. We may add, however, that in A. S. No. 358 of 1974, 2/5th of the superstructure in item-1 was still to be treated and considered as partible property to which all the heirs and sharers to the estate of Abdul Azeez would be entitled in accordance with their legitimate shares.

17. We now pass on to A S. No. 708 of 1977. This was a case filed by one Subramania Nadar against R. B. Govindasami Naidu figuring as the first defendant and defendants 2 to 5. We are maintaining the description of the parties as is referred to in O. S. No. 43 of 1970. R. B. Govindasami Naidu, the first defendant in the suit, numbered as O. S. No 48 of 1973 on the file of the Sub-Court, Chidambaram, the decision against which is appealed against in A. S. No. 708 of 1977 was the mortgagee who was in possession of the suit properties, he having secured such a mortgage with possession under Exhibit B-1 from Azeez. We have already seen that under cover of the endorsement made in Exhibit B-1 itself on 10th March, 1963, Mr. Govindaswami Naidu is to be said to have delivered possession of the suit properties to the first defendant who paid off the mortgage by reason of the *hiba* which was the subject-matter of the appeal in A. S. No. 358 of 1974. Subramania's case is that after Fathima Beevi secured such possession from R. B. Govindaswami Naidu, she leased the property to him under Exhibit C-2 (marked as such by virtue of our allowance of the application for filing additional documents, namely, C. M. P. No. 1728 of 1978) Subramania's further case is that he was in possession of the suit properties by virtue of the lease Exhibit C-2 and in or about 1968, one Kesava Padayachi and eight others sought to interfere with the possession of the suit property alleging that they got a lease of the very same properties from the plaintiffs and the 6th defendant. Finding that their attempt to secure possession which they demanded of the suit properties was not acceded to by Subramania, they filed O. S. No. 545 of 1968 on the file of the District Munsif's Court, Chidambaram and sought for an injunction as against Subramania as the lessee of the first defendant from interfering with their entitlement to possession of the suit properties. This is seen from Exhibit B-48 which is the plaint filed in that suit. Along with the presentation of the suit, I. A. No. 1161 of 1963 was also filed by Kesava Padayachi and others as against Subramania and the first defendant seeking for an injunction restraining the first defendant and Subramania from interfering with their lawful possession. In fact, it is alleged in Exhibit B-48 that Kesava Padayachi and others were let into possession by Azeez himself and after the death of Azeez, some of his heirs allowed them to continue in possession and it was in such circumstances, they got into possession of the suit properties and

interference by Subramania on the strength of Exhibit C-2 was unwarranted. This application for interim injunction was ordered. An attempt was made to vacate the order of interim injunction which was obviously taken out by Subramania in that very suit. This was dismissed as is seen from Exhibit B-49 dated 27th October, 1969 in and by which the order of interim injunction was made absolute. Finally, for reasons which are not very clear, on 4th March, 1970, Kesava Padayachi withdrew the suit and reported that he was not pressing the same. When this was the position, the present suit O. S. No. 48 of 1973 on the file of the Sub-Court, Chidambaram was filed by Subramania impleading R. B. Govindasami Naidu as the first defendant and defendants 2 to 5 as defendants in the above suit. The reason for impleading defendants 2 to 5 as defendants to the present action is not too clear.

18 The claim of the defendants 2 to 5, as already stated in the other two appeals, is based on a purchase of the plaintiff's share in suit items 7, 8 and 10 as sharers in the estate of Azeez. This purchase was under Exhibit B-2 dated 5th April, 1961. Finding that the plaintiffs were no longer interested in a portion of the suit property or for reasons not again clear, Subramania impleaded only Govindasami Naidu, the quondam mortgagee and defendants 2 to 5 as party-defendants to the action and he did not implead his lessor, the first defendant and other proper parties to the action. This is only by the way. On the strength of Exhibit C-2 which is the lease deed under which Subramania claimed possessory rights in the suit properties, he prayed for a declaration that he was entitled to rights under the Cultivating Tenants' Protection Act and for other ancillary reliefs. The Court below found that Subramania was not in possession of the suit property and, therefore, he was not entitled to the declaration as prayed for. Subramania appeals.

19. Mr. Ratnam, the learned counsel for Subramania contends that after the disposal of the suit filed by Kesava Padayachi which terminated on 4th March, 1970, under Exhibit B-50, there was correspondence between Kesava Padayachi and others on the one hand and Subramania on the other. On a reading of Exhibit C-4 and C-5 which were notices exchanged between the above two parties and which documents also were received by us in appeal while allowing C.M.P. No. 1728 of 1978, it does not take the case of Subramania further excepting to say that Subramania also had an interest in the usufructs which were raised on the suit properties. In fact, the case of the parties is that casuarina worth about Rs. 9,000 was raised on the suit lands and it was Subramania who raised it. There were disputes about it. On a reading of Exhibits C-4 and C-5, it is clear that a sum of Rs. 3,000 was received by Subramania and the balance was paid over to Kesava Padayachi and ultimately nothing happened. Exhibits C-4 and C-5 do not clinchingly point out as to who was or who continued in possession of the suit properties after the disposal of the suit under Exhibit B-50. It is in these circumstances, the question arises whether Subramania is right in having impleaded only Govindasami Naidu and defendants 2 to 5 as a party defendants to this action. One would have expected, for a fuller and complete adjudication of the rights claimed by Subramania, for him to have impleaded not only the first defendant but also all the heirs of Azeez, so that there could have been a hearing of the case in the presence of all proper parties. What defendants 2 to 5 secured under Exhibit B-2 was only a right over a part of the suit properties, they having purchased it from the plaintiffs under Exhibit B-2. Even they, as alienees had only a right to file an independent suit for partition and obtain possession of their share after it is demarcated and allocated to them in such a suit. Instead of that, they attempted to enter into possession of the totality of the suit property on the strength of Exhibit B-2 and added that there was such lawful possession of the entirety of the suit properties by Kesava Padayachi and others as is seen from Exhibit B-4. Exhibit B-4 is a document which touches on the rights over immovable property. As it is unregistered, it cannot be looked into for any purpose and rightly, therefore, the learned Judge would not rely upon Exhibit B-4 and rejected it as inadmissible. The sheet-anchor of the case of defendants 2 to 5 is Exhibit B-4. But for the said document, they have no semblance of a possessory title over the property though under Exhibit B-2 they could project a right of ownership over only a portion of it. But, only some interested persons are parties to this action. It is in this way we characterise the suit of Subramania as one instituted not against all proper parties or necessary parties.

20. When the suit was set for hearing Subramania's case was that he having entered into possession of the property by vittue of Exhibit C-2 which was a lease deed entered into between himself and the fiirst defendant, he continued in such possession and

in substantiation of that contention, Mr. Rathnam appearing for him before us would rely upon the entries in the adangal made in the year 1971, and thereafter. These entries in the adangal marked as Exhibit B-53 to B-56 were rightly rejected by the Court below with the observation that those entries having been made after the suit in O.S. No. 43 of 1970 was filed, no weight could be attached to them. We are of the view that this is not the way in which a fair appraisal ought to be given to such records. If really Kesava Padayachi at one time or defendants 2 to 5 at any other time as they claimed, came into possession of the suit properties, nothing prevented them from causing such entries to be made in the adangal basing on such judicial, lawful and physical possession. No such attempt has been made. But on the other hand, the first defendant by virtue of the *hiba* and her discharge of the mortgage in favour of Govindasami Naidu and obviously relying upon the recital that she secured possession of the property from Govindasami Naidu who was in possession of the same as mortgagee in possession sought for such entries being made in the adangal and was successful in securing them. Exhibits B-53 to B-56 no doubt support the appellant's case. But the point, however, in the present case is whether the entries Exhibits B-53 to B-56 by themselves are sufficient for Subramania to seek for the declaration sought as he did in the Court below. The telling piece of evidence which has not been got over in spite of the able arguments of Mr. Ratnam is the judgment and connected records in O.S. No. 545 of 1968 on the file of the District Munsif, Chidambaram. Under Exhibit B-49, it is seen that Kesava Padayachi secured an order of injunction restraining the first defendant and Subramania from interfering with their possession. The pronouncement was made on 27th October, 1969. Kesava Padayachi, for reasons not known, and certainly not clear did not press his suit a few months thereafter and it was dismissed as not pressed on 4th March, 1970, *vide* Exhibit B-50. The normal presumption is that Kesava Padayachi continued in possession of the property till 4th March, 1970 and immediately thereafter. Excepting for the entries in the adangal which were made in the year, 1971, showing the first defendant Fathima Beevi as the person in possession of the suit properties, there is no other contemporary record to show that Kesava Padayachi and others who were admittedly in possession of the suit property till 4th March, 1970 ever surrendered possession to anyone including defendants 2 to 5. We have already stated that the story of defendants 2 to 5 that they secured such surrender under Exhibit B-4 is not believable because the document is not admissible and there is no further attempt to prove this allegation. In this paradoxical state of affairs, the difficult question that arises is as to who is in possession of the suit property. The adangal register speaks as if the first defendant was in possession in 1971. The decision of a competent Court declared that Kesava Padayachi was in possession of the property in 1970. The empty claim of defendants 2 to 5 is that they got possession of it through Kesava Padayachi under Exhibit B-4 which we have discarded since it is legally inadmissible in evidence. Certainly, therefore, in such a nebulous state of affairs, a declaration as sought for by Subramania cannot be granted. But Mr. Ratnam still harps upon Exhibit C-2 as the foundation for his entitlement for the grant of the relief that he is entitled to a declaration that he is a cultivating tenant. Such an entitlement is based on physical possession. We have expressed on more than one occasion in the course of our judgment that we are unable to pinpoint as to who is in actual possession of the property having regard to the ambulatory evidence let in in this case by both parties. One other argument of Mr. Ratnam is that the claim of defendants 2 to 5 that they are in possession of the suit properties in fanciful for the reason that they had at all material times only a right of ownership over a part of the suit properties and not over its entirety. In those circumstances, even if they have been inducted into possession by Kesava Padayachi and others, they could not legitimately resist the possession of Subramania of the rest of the property which, by reason of the finding of ours regarding the sustainability of the *hiba* in favour of the first defendant, the first defendant can lawfully induct Subramania into the rest of the property and to that extent at least, Exhibit C-2 has to be sustained. There is no doubt force in this contention. But in the absence of definite and clinching evidence to show that Subramania ever entered into physical possession of this property, at some point of time, it would be difficult to hold that the appellant is entitled to a declaration that he is a cultivating tenant. In these circumstances and for the reasons above stated, but not on the same grounds as was considered by the Court below, that part of the judgment of the trial Court regarding the issue under consideration is sustained.

21. In passing, however, we may observe that it is for Subramania to work out his rights in a manner known to law to secure such declarations to which he would be entitled to and the judgment in these proceedings will not be a bar to him because no finding has been given in this case by us about the nature of possession which he could claim over the suit property. It is for him to work out such rights in the presence of all the sharers including defendants 2 to 5 who claimed to be the alienees of a part of the property by reason of Exhibit B-2.

22. A.S. No. 708 of 1977 *inter alia* concerns itself with items, 7, 8 and 10. The other item which is also the subject-matter of this appeal is item 9. Subramania stated that he is the owner of this property and has sought for a declaration as to his title by reason of a purchase of the property from the predecessor-in-interest and for a consequential injunction restraining the defendants from laying any manner of claim or interest over it. Here again, Govindasami Naidu is an unnecessary party. Defendants 2 to 5 have been impleaded to this action by Subramania on the ground that they projected an interest over a part of this item by reason of their purchase of the share of the plaintiffs under Exhibit B-2.

23. The short question to be considered is whether item 9 is to be deemed to be still in the family of Azeez susceptible to partition amongst the sharers after the death of Azeez. Admittedly item 9 formed part of the estate of Azeez. Ordinarily, it ought to have been shared by all the sharers. But the *hiba* which we have sustained in the earlier part would entitle the first defendant alone to claim this property. But whether the property still could be considered so in view of certain supervening circumstances which we shall presently refer to is an independent matter. It is the common case of all parties that in so far as item 9 was concerned, Azeez. himself did not pay the pnblic dues and in order to realise such dues, the sale notice Exhibit B-24, was issued by the Special Loan Deputy Tahsildar for the sale of this item of property amongst others. No doubt, this notice was sent only to the first defendant and not to all the sharers. Not having had satisfaction in spite of the publication of the sale notice in the matter of the clearance of arrears of public dues, the property was brought sale and one Mohamad Ali Maracair purchased the ptoperty as is seen from Exhibit B-25. Exhibit B-25 is an order of the Revenue Divisional Officer showing that Azeez was in arrears of loans and he defaulted in paying them and that there was no irregularity in the publication of the notices and that, therefore, he was confirming the sale in favour of Mohamad Ali Maracair who was the highest bidder in the public auction held for the purpose. Pursuant to such a purchase, Mohamed Ali Maracair paid kists also, as is seen from Exhibit B-27. Finally Mohamad Ali sold this property to Subramania under a registered sale deed marked as Exhibit B-51 dated 25th November, 1971. The title of Subramania, therefore, is traceable to the title of Mohamed Ali who in turn purchased the property in a public auction held for the purpose of the realising public dues under the Revenue Recovery Act.

24. Mr. Thillai Villalan's contention is that as the notice of sale has not been sent to all the sharers, it is vitiated and that Mohamed Ali Maracair is none else than the brother of Fathima Beevi who is the first defendant. Both these objections do not appeal to us as sustainable ones. We have seen that the Revenue Divisional Officer under Exhibit B-25 has recorded that the notices issued in connection with the public sale were proper and in accordance with the prescribed procedure. Even otherwise, the first defendant who by then paid off the mortgage amount which she had to pay by virtue of the direction given to her contemporaneous with the *hiba* made on the property by her husband was probably recognised by the Revenue Department as the only person entitled to the property and who had an interest in it. Even otherwise, the non-service of notice to the other sharers would not vitiate the sale and make it void. It might be voidable. But it stood the test of time for nearly six years until the filing of the present suit. No one including the plaintiffs who are the predecessors-in-interest of defendants 2 to 5 ever objected to the manner in which the property was publicly sold. The first contention, therefore, fails.

25. The second contention is that the property was purchased by the first defendant's brother. This would not tilt the matters at all. In a public sale, any one is entitled to bid and purchase the property which is the subject-matter of public sale. The fact that the highest bidder happens to be related to one of the parties to the litigation cannot be the basis o

attack on the validity of the public sale itself. We hold that Mohamed Ali Maracayar became the owner of item 2 of the plaint schedule by virtue of his purchase under Exhibit B-25 and that his later sale under Exhibit B-1 to Subramania is valid and enforceable The lower Court was not right in having rejected the relief to Subramania over this item also. We, therefore, set aside the judgment of the trial Court in so far as it has held against Subramania in relation to item 9 of the suit property and hold that Subramania is entitled to the declaration as prayed for over item 9 and the defendants who claimed to be in possession of the property are bound to deliver possession of the same irrespective of the other controversies in the domestic litigation already referred to above. This appeal in part is allowed. But there will be no order as to costs. If as represented by Mr. Thillai Villalan, defendants 2 to 5 have raised casuarina crop over item 9 of the plaint schedule, the lower Court shall make sufficient amends available in law in their favour at the time of directing physical delivery of possession of this item to the appellant.

26. As a result of our judgment in A.S. No. 708 of 1977, no further orders are necessary in C.M.A. No. 706 of 1974. It is dismissed.

27. In all the appeals, the party who is successful shall bear his or her costs.

R.S. *A.S. No.* 358 *of* 1974 *allowed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

Karmega Kone .. *Appellant**

v.

Udayar Kone and others .. *Respondents.*

Adverse possession—Plea of stands on same footing as plea of estoppel—Specific plea in pleadings necessary.

The plea of adverse possession is an essential question based upon provable facts and cannot rest upon mere surmises and stories weaved out in the course of the trial and in the witness box. The plea of adverse possession stands on the same footing as the plea of estoppel. It has been the consistent view of Courts that a plea of estoppel has to be pleaded and not only pleaded but also proved. So also a plea of adverse possession, which again rests upon proof of positive and essential facts, has to be pleaded, so that the adversary might be able to meet the specific case of the party, who unjustly wishes to wrest the property belonging to another and claim title in himself on the plea of adverse possession. A plea of adverse possession essentially implies that the person claiming title to a property on that basis does not own it. He wishes to snatch it from the real owner on the bare ground that he was continuously, publicly and openly in possession of the property of the adversary to the knowledge of the adversary and without any objection or intervention on the part of the real owner. These are essential facts which form the rocky foundation of the plea of adverse possession. The law requires an express pleading on that question for the simple reason that the real owner, who is said to have been lethargic, might set up a case (might be true in some cases) that such possession of the claimant was only permissive and was never intended to be adverse so far as his real title was concerned and that, even if it could be projected as an adverse claim, the title from which it should be deemed to have commenced should also be made specific and public, so that the real owner might be given a fair and just opportunity to plead otherwise and set up a case that such adverse possession as claimed by the other person did not begin on the date claimed by him. It is because of such necessity of proof of such essential elements like those enumerated above that the law requires a specific plea in the pleadings regarding adverse possession. [*Para.* 3.]

Case referred to:—

Karim v. *Bibi Sakina*, (1964) 2 S.C.J. 224: (1964) 6 S.C.R. 780: A.I.R. 1964 S.C. 1254.

Appeal against the decree of the Court of the Subordinate Judge, Ramanathapuram at Madurai in Appeal Suit No. 3 of 1974, preferred against the decree of the Court of the District Munsif of Ramanathapuram in Original Suit No. 67 of 1970.

The Court delivered following

JUDGMENT.—The first defendant in O.S. No. 67 of 1970 on the file of the Court of the District

*S.A. No. 2489 of 1974. 1*st December*, 1978.

Munsif of Ramanathapuram is the appellant herein. The plaintiffs came to Court for a declaration of their title to the suit property and for a permanent injunction restraining the first defendant, who is the grandson of the second defendant, and also the second defendant, from interfering with the plaintiffs' possession of the suit property, or, in the alternative, for recovery of possession. Both the Courts found that the plaintiffs-respondents were entitled to the suit property. The trial Court was, however, of view that, notwithstanding such vesting of title in the plaintiffs they had lost it, because the defendants were adversely in possession of the suit property for the prescribed time as against the true owners and that therefore the plaintiffs were not entitled to either possession or declaration as prayed for. On appeal, however, the appellate Court noticed that there was no plea as to adverse possession as required in law and therefore held that, in the absence of such a pleading, the appellant-defendant could not succeed on a bare story of entitlement on the basis of adverse possession trotted out in the course of the trial. In that view, the appellate Court allowed the appeal, set aside the judgment and decree of the trial Court and decreed the suit as prayed for. The first defendant has filed the present appeal as against the said judgment.

2. The only question which arises for consideration is whether a litigant, without expressly setting up a plea of adverse possession, can succeed on such a circumventory title, even though the litigant is unable to prove his basic and real title to the property under litigation. Following the judgment of the Supreme Court in *Karim* v. *Bibi Sakina*,[1] wherein the Supreme Court had observed that not only should there be proof of continuity, publicity and extent while setting up a plea of adverse possession, but such a plea should also be expressly pleaded to show as to when possession became adverse as against the real owner, so that the starting point of limitation against the party affected, could be found, and the rights of parties adjudicated upon, the appellate Court reversed the judgment of the trial Court.

3. The plea of adverse possession is essentially a question based upon provable facts and cannot rest upon mere surmises and stories carved out in the course of the trial and in the witness box. The plea of adverse possession stands on the same footing as the plea of estoppel. It has been the consistent view of Courts that a plea of estoppel has to be pleaded and not only pleaded but also proved. So also a plea of adverse possession, which again rests upon proof of positive and essential facts, has to be pleaded, so that the adversary might be able to meet the specific case of the party, who unjustly wishes to wrest the property belonging to another and claim title in himself on the plea of adverse possession. A plea of adverse possession essentially implies that the person claiming title to a property on that basis does not own it. He wishes to snatch it from the real owner on the bare ground that he was continuously, publicly and openly in possession of the property of the adversary to the knowledge of the adversary and without any objection or intervention on the part of the real owner. These are essential facts which form the rocky foundation of the plea of adverse possession. The law requires an express pleading on that question for the simple reason that the real owner, who is said to have been lethargic, might set up a case (might be true in some cases) that such possession of the claimant was only permissive and was never intended to be adverse so far as his real title was concerned and that, even if it could be projected as such an adverse claim the time from which it should be deemed to have commenced should also be made specific and public, so that the real owner might be given a fair and just opportunity to plead otherwise and set up a case that such adverse possession as claimed by the other person did not begin on the date claimed by him. It is because of such necessity of proof of such essential elements like those enumerated above that the law requires a specific plea in the pleadings regarding adverse possession. These things being absent in this case, and the plea having been set up only in the course of the trial, the learned appellate Judge was right in having negatived the claim of the appellant based solely upon the theory of adverse possession, which was not pleaded, thought sought to be proved in the course of trial.

4. The judgment of the appellate Court is right. The second appeal does not pose any other question of law. The second appeal is accordingly dismissed. There will be no order as to costs.

R.S. —— *Appeal dismissed.*

1. (1964) 2 S.C.J. 224: (1964) 6 S.C.R. 780: A.I.R. 1964 S.C. 1254.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Ramaprasada Rao, C.J.*

C. G. Ramanathan .. *Petitioner**

v.

Commissioner, Corporation of Madras, Madras. .. *Respondent.*

Madras City Municipal Corporation Act (IV of 1919), section 100—Fixation of annual value of building—Method to be followed.

In order to arrive at the annual valuation of premises ordinarily let out and which is within the jurisdiction of the Corporation of Madras, the taxing authorities are entitled to assess and estimate the rent which the property may fetch, when the property is leased out in the normal course. What it may 'reasonably be expected to fetch' is a matter which varies from case to case: it all depends on the facts of each case. If there is no proof of actual letting of the building prior to the challenged valuation for the purpose of fixing the property tax, then the yardstick adopted by the Corporation in fixing such reasonable rent can be scrutinised by the authorities in the higher hierarchy. But, if on the other hand, there is no proof or at any rate, acceptable material on which the taxing authorities can act and arrive at the reasonable rent which the property would fetch in normal circumstances, then such material cannot be lightly brushed aside and it is not open to the owner to dictate that the rent which was being paid by the tenant in occupation, after negotiations with him, should be taken, willy-nilly, as the basis for arriving at the annual value of the premises. If there is available material, which has to be accepted and against which nothing is said, then it is mandatory on the part of the taxing authorities, functioning under the City Municipal Corporation Act, to adopt the rent quoted in the lease deed, unless it is shown to be far too low than the market rent.

Held, that in the present case there was abundant proof, which is also admitted, that a few months before, the premises were let out for Rs. 900 per month, the additional amount of Rs. 400 being referable to amenities. It followed that the reasonable rent which the permises can be expected to fetch at all times can be fixed at Rs. 900 per month. In this view of the matter, the order of the Appellate Authority cannot be sustained. It is accordingly set aside, and the rental value is fixed at Rs. 900 per month.

[*Para.* 1.]

Case referred to:—

Municipal Council v. *Haniffa*, (1969) 2 M.L.J. 495.

Petition under rule 19-A, Part V of Schedule IV of the Madras City Municipal Corporation Act, 1919 read with section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Chief Justice, Court of Small Causes, dated 15th March, 1977 and made in M.T.A. 291/75 (RDHA. No. 12/110 for the 2/1973-74 dated 25th March, 1975, Taxation Appeal Committee, Corporation of Madras (Madras).

A. C. Muthanna, M. Subramaniam and *N. Rajaram*, for Petitioner.

S. Palaniswamy, for Respondent.

The Court delivered the following

JUDGMENT:—The owner of premises No. 72, Archbishop Mathias Street, Madras, aggrieved by the order of the Chief Judge, Court of Small Causes, Madras (Appellate Authority under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960), who fixed the annual value of the premises at Rs. 10,920 has filed this civil revision petition. The main contention before me is that, even though the property would fetch a rent of Rs. 900 per month and an additional income of Rs. 400 per month towards amenities provided in the premises earlier to 31st March, 1973. yet after 31st March, 1973, to wit, in June, 1973, the premises were let out to Parry and Company for occupation by one of its officers, on a rent of Rs. 600 per month and an additional charge of Rs. 200 per month for amenities. The main contention of Mr. Gopinath, learned counsel for the petitioner, is that as there is proof of payment of such rent in the form of rent receipts and a lease deed *inter se* between the landlord and the tenant, there is no possibility of any speculation in this case nd that the rent ought to be fixed on the basis of the actuals and not on mere assumptions or best judgment method. On the other hand Mr. Palaniswamy, learned counsel for the Corporation, would refer to section 100 of the City Municipal Corporation Act, 1919, and would say that in certain circumstances the actuals paid by the tenant may

*C.R.P. No. 949 of 1978. *18th January,* 1979.

not be a safe guide for arriving at the annual valuation of the premises, as other circumstances should also be taken into consideration to fix the reasonable rent which the property is likely to fetch in the open market, if let out freely. For this purpose he would rely upon the admitted fact that the same property, before it was let out to Parry and Company, was fetching a monthly rent of Rs. 1,300 made up of Rs. 900 rent and Rs. 400 as charges for amenities. He would also contend that the landlord had accepted the assessment on the rental basis of Rs. 1 000 per month even at the time when the rent was Rs. 900 plus Rs. 400 (rent and amenities). He would therefore seek to sustain the order of the Appellate Authority, who fixed the rental value at Rs. 1,000 and directed the taxing authority to arrive at the annual value on that basis In order to arrive at the annual valuation of the premises, which is ordinarily let out and which is within the jurisdiction of the Corporation of Madras, the taxing authorities are entitled to assess and estimate the rent which the property is leased out in the normal course. What is 'reasonably be expected to fetch', is a matter which varies from case to case: it all depends on the facts of each case. If there is no proof of letting the building prior to the challenged valuation for the purpose of fixing the property tax, then the yardstick adopted by the Corporation in fixing such reasonable rent can be scrutinized by the authorities in the higher hierarchy. But if, on the other hand, there is proof or, at any rate, acceptable material on which the taxing authorities can act and arrive at the reasonable rent which the property would fetch in normal circumstances, then such material cannot be lightly brushed aside and it is not open to the owner to dictate that the rent which was being paid by the tenant in occupation, after negotiations with him, should be taken, willy-nilly, as the basis for arriving at the annual value of the premises. In fact a Division Bench of this Court in *Municipal Council, Tirunelveli* v. *Haniffa*[1], while considering a provision under the District Municipalities Act, which is *in pari materia* with section 100 of the City Municipal Corporation Act, observed that, though the Municipality, while determining the annual rental value, was not bound by the actual rent paid by the tenant. the rent fixed under the lease deeds should normally be taken as the best *prima facie* evidence, in the absence of proof that any other element was reasonable for fixing up a lower rent, and that, if the Municipality wanted to enhance the rent, there must be proof that a hypothetical tenant intending to use the property for the same purpose would pay more. In the instant case it is not necessary to consider a hypothetical tenant, for, a few months before the date when the property was leased out to Parry and Company, the property was fetching a rent of Rs. 900 per month with an additional amount of Rs. 400 towards charges for amenities. It therefore appears to me that, having regard to such material, which is acceptable and which ought to be acted upon, the authorities should be asked to arrive at the annual valuation of the premises on that basis for the reason that it is not questioned before us as being either unfair or illusory. In fact, it appears that the Corporation estimated the rent, in spite of the available proof as stated above, on the basis that the rental yield was Rs 1,000. As to why this was done is not clear. It is in this sense that the decision of the Division Bench referred to above comes to the rescue of the petitioner. If there is available material, which has to be accepted and against which nothing is said, then it is mandatory on the part of the taxing authorities functioning under the City Municipal Corporation Act, to adopt the rent quoted in the lease deed, unless it is shown to be far too low than the market rent. No such inference can be drawn in the instant case. I am unable to agree with the Appellate Authority when it adopted the total rent of Rs. 1,300 which included a sum of Rs. 400 towards charges for amenities. and having found that the total rent ought to be Rs. 1,300, and allowing a deduction of Rs. 200, it arrived at the monthly rent of Rs. 1,000. I am unable to accept this conclusion. There is abundant proof, which is also admitted, that a few months before, the premises were let out for Rs 900 per month, the additional amount Rs. 400 of being referable to amenities. It follows that the reasonable rent which the premises can be expected to fetch at all times can be fixed at Rs. 900 per month. In this view of the matter, the order of the Appellate Authority cannot be sustained. It, is accordingly set aside, the rental value is fixed at Rs. 900 per month, and the taxing authorities will fix the annual valuation on this basis.

2. The civil revision petition is allowed. There will be no order as to costs.

R.S. —— *Revision petition allowed*

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1. (1969) 2 M.L.J. 495.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

Karuppusami Gounder .. *Appellant**

v.

Palaniswami Gounder .. *Respondent.*

Easement — Suit for permanent injunction — Common pathway of co-owners — Right reserved for enjoying particular land — Not open to one of the co-owners to enjoy it to reach some other land.

Land S No. 880 belonged to the defendant and his two brothers *P.* and *R.* In the partition effected between them under Exhibit A-2, they left a common pathway in S.No. 880. At that time, the plaintiff was the owner of S. No. 867 which was adjoining the pathway. Subsequently, the plaintiff purchased the share of *P* in S.No. 880 with the pathway right from *P*'s son under Exhibit A-1. The plaintiff claimed the pathway right to reach S. No. 867. This was objected to by the defendant. The plaintiff filed a suit for permanent injunction restraining the defendant from interfering with his right to use the pathway for reaching S. No. 867. The trial Court dismissed the suit, but the lower appellate Court allowed the suit. The defendant filed a second appeal,

Held:—It would not be open to one of the co-owners of the common pathway—right reserved for enjoying a particular land to enjoy that right for reaching some other land. It was not open to the plaintiff to use the common pathway in the present case reserved for enjoyment of S.No. 880, to reach some other land, namely, S.No. 867 which belonged to the plaintiff and not to any of the three brothers at the time of partition between those three brothers (under Exhibit A-2.)

[*Para.* 4.]

Cases referred to:—

Subbiah Goundan v. *Ramaswamy Goundan*, (1972) 85 L.W. 659: A.I.R 1973 Mad. 42; *Karuppa Gounder* v. *Muthuswamy Gounder*, (1968) 1 M L.J. 397; *Venkatarama Sastri* v. *Venkatanarasayya*, (1929) 29 L.W. 613: A.I.R. 1929 Mad. 25.

Appeal against the Decree of the Court of the Subordinate Judge, Erode in Appeal Suit No. 147 of 1974 preferred against the decree, of the Court of the D ct Munsif, of Dharapuram in Original Su o. 417 of 1971.

C. Chinnaswami, for A ellant.

S. Sivasubramaniam and *M. Venkatachalapathy* for Respondent.

The Court delivered the following

JUDGMENT:—The defendant, who had succeeded in the trial Court, but lost before the lower appellate Court, is the appellant. The respondent-plaintiff filed a suit for permanent injunction restraining the defendant from interfering with his right to use the suit pathway lying in S. No. 880 in Nilai Village in Dharapuram taluk for reaching the adjoining S. No. 867 of the same village. It is common ground that S. No. 880 belonged originally to the joint family of the defendant and his two brothers Periaswami and Rakkianna. In the partition effected between the three brothers under Exhibit A-2, dated 26th September, 1970, they left a common pathway in S. No. 880. At that time, the plaintiff was the owner of S. No. 867 which adjoins the pathway kept in common by the three brothers who got S. No. 880 divided leaving a common pathway for reaching their respective shares. Subsequently, the plaintiff purchased Periaswami's share in S. No. 880 with the pathway right from Periaswami's son Velusami under Exhibit A-1 dated 12th June, 1970 and he was enjoying the right. The plaintiff claimed the right to enjoy the pathway right to reach S. No. 867. This was objected to by the defendant. It is under these circumstances, the plaintiff filed the suit for a permanent injunction restraining the defendant from interfering with his right to use the pathway for reaching S. No. 867.

2. The defence was that the plaintiff was entitled to use the pathway only for reaching his share in S. No. 880 and he is not entitled to use the pathway for reaching some other land bearing S. No. 867 and the plaintiff is, therefore, not entitled to the permanent injunction.

3. The trial Court found that the plaintiff is not entitled to use the pathway kept in common in S. No. 880 by the three brothers who are parties to the partition deed, Exhibit A-2 for reaching some other land, namely, S. No. 867 and it dismissed the suit with costs. But on appeal, the learned Additional Subordinate Judge held, following the decision of

*A.S. No. 2294 of 1975. *22nd November*, 1978.

Palaniswamy, J. in [illegible]biah *Goundan* v. *Ramaswamy Goundan*[1], that the plaintiff is entitled to use the common pathway for reaching S. No. 867 and he, accordingly allowed the appeal with costs and decreed the suit as prayed for with costs.

4. The learned counsel for the defendant reiterated that the plaintiff is not entitled to use the pathway kept in common in S. No. 880 by the three brothers who are parties to the partition under Exhibit A-2, for reaching S. No. 867 merely on the ground that he had purchased the right of one of the three brothers from the son of the brother together with the right in the common pathway which is stated to be 15 links in breadth. On the other hand, the learned counsel for the plaintiff relied upon the very same decision of Palaniswamy, J. and submitted that so long as it is not shown that the defendant is affected by the plaintiff using the pathway for reaching S. No. 867 also, he is not entitled to interfere with the use of the common pathway by the co-owner. The observations of Palaniswamy, J., as extracted in the judgment of the learned Subordinate Judge, are:

> "If he happens to acquire a new land adjacent to his share and if that land can be approached through the common pathway, he cannot be prevented from using the common pathway, provided his user of the common pathway does not interfere with the rights of the other co-owner in the common pathway. Similar instances are such as setting apart common pathway, for use as thrashing floor or common passage in buildings. A co-owner of a common passage in a building can use such passage, not only to reach his portion which he got under the partition; but also to reach any addition, which he may put or any accretion which he may make adjacent to his property, provided his user of the common passage does not interfere with the user thereof by the other co-owners, likewise, the common owner of the thrashing floor can use it not only for thrashing the paddy got from the land which he got for his share in the partition, but also for thrashing the paddy which he may get from a land which he may acquire subsequently. Such user so long as it does not interfere with the use by the other co-owner, cannot be objected to by the other co-owners. It would be most unreasonable to say that the paddy got by the co-owner from the land which fell to his share in the partition should alone be thrashed in the common thrashing floor."

Palaniswamy, J., has referred to the decision of Ramamurti, J. in *Karuppa Gounder* v. *Muthuswamy Gounder*[1], in which reference has been made to the decision of a Bench of this Court in *Venkatarama Sastri* v. *Venkatanarasayya*[2]. In this decision, Ramamurti, J., on a review of the case-law, held that when a well or some source of irrigation irrigates land belonging to several persons, the source of irrigation cannot be divorced or dissociated from the lands and that irrespective of the question of damage, the plaintiff, one co-owner would be entitled to an injunction to restrain another co-owner from using the well to irrigate some other land, on the simple ground that the defendant has no right to use the water for irrigating other lands. Ramamurti, J., has pointed out in his decision the uniform trend of decisions of this Court not to permit the co-owner to irrigate any land newly acquired by him. In *Venkatarama Sastri* v. *Venkatanarasayya*[2], the defendants attempted to take water from the tank to convert their dry lands in the village into wet lands by using the tank water. The plaintiffs, the common owners of the tank, prayed for an injunction to restrain the defendants from using the water, for that purpose. Though, in that case, the plaintiffs had proved that they had suffered damage on account of such use of water by the defendants, the Bench held that the plaintiffs would be entitled to an injunction even if no damage had been proved and in that view, the plaintiffs were entitled to an injunction on the principle that the right to the water in the well is co-extensive with the right to irrigate a particular land and theright in the well is inseparably connected with the land. Palaniswamy, J., has observed in his judgment:

> "A co-owner of a common passage in a building can use such passage not only to reach his portion he got under the partition but also to reach any addition which he may put or any accretion which he may make adjacent to his property, provided his user of the common passage does not interfere with the user thereof by the other co-owners. Likewise the common owner of a thrashing

1. (1972) 85 L.W. 659: A.I.R. 1973 Mad. 42.

1. (1968) 1 M.L.J. 397.
2. (1929) 29 L.W. 613: A.I.R. 1929 Mad. 25.

floor can use it not only for thrashing the paddy got from the land which he got for his share in the partition, but also for thrashing the paddy which he may get from a land which he may acquire subsequently. Such user, so long as it does not interfere with the use by the other co-owners, cannot be objected to by the other co-owners. It would be most unreasonable to say that the paddy got by the co-owner from the land which fell to his share in the partition should alone be thrashed in the common thrashing floor. Cases of extension of balcony over a common passage also stand on the same footing. The principle underlying the enjoyment of common property is that one co-owner can use the common property to his maximum advantage, subject of course to the rights of the other co-owner not being in any way materially interfered with and without damaging or weakening the common property."

With respect, what all Palaniswamy, J., has stated would apply to cases of enjoying the common right with reference to the property for the enjoyment of which that right has been reserved in common. Palaniswamy, J., has not stated in his judgment how the decision of Ramamurthi, J., in *Karuppa Gounder* v. *Muthuswami Gounder*[1] in which a Bench decision of this Court in *Venkatarama Sastri* v. *Venkatanarasayya*,[2] was followed, will not apply to the facts of the present case. In those decisions, it has been held that a co-owner of a well intended to irrigate particular lands is not entitled to take his share of water in the well for irrigating some other lands. In my opinion, that principle would apply even to a common pathway right reserved for enjoying a particular land and it would not be open to one of the co-owners of the common right to enjoy that right for reaching some other land. In view of the fact that the principle laid down in the Bench decision of this Court has been followed by Ramamurthi, J., in *Karuppa Gounder* v. *Muthusami Gounder*,[1] namely *Venkatarama Sastri* v. *Venkatanarasayya*,[2] it is not possible to agree with the learned counsel for the plaintiff that this case should be referred to a Bench in view of the view taken by Palaniswamy, J., in *Subbiah Gounder* v. *Ramaswamy Gounder*[3]. Following the principle laid down in the Bench decision in *Venkatarama Sastri* v. *Venkatanarasayya*,[2] I hold that it is not open to the plaintiff to use the common pathway in the present case reserved for the enjoyment of S. No. 880, to reach some other land, namely, S. No. 867 which belonged to the plaintiff and not to any of the three brothers at the time of partition between those three brothers under Exhibit A-2 on 26th September, 1960. Accordingly, the second appeal is allowed with costs throughout and the suit is dismissed.

1. (1968) 1 M.L.J. 397.
2. (1929) 29 L.W. 613: A.I.R. 1929 Mad. 25.
3. (1972) 85 L.W. 659: A.I.R. 1973 Mad. 42.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—*T. Ramaprasada Rao, C.J, and G. Ramanujam, J.*

Sarojini Ammal represented by power of Attorney Agent, A. Gopalan and others .. *Petitioners**

v.

The State of Tamil Nadu represented by the Secretary to Government, Revenue Department, Madras .. *Respondent.*

(A) *Tamil Nadu Cultivating Tenant's Arrears of Rent (Relief) Act (XXI of* 1972)—*Provisions of the Act whether violative of Articles* 14, 19 *and* 31 *of the Constitution.*

(B) *Constitution of India* (1950), *Aticles and* 14, 19 *and* 31.

Tamil Nadu Cultivating Tenants, Arrears of Rent (Relief) Act (XXI of 1972), was passed by the State Legislature and received the assent of the President on 9th August, 1972. The Act is intended to give relief to cultivating tenants as they were not in a position to pay the arrears of rent on account of their indebtedness and poor economic condition and to protect them against actions initiated for their eviction and for recovery of arrears of rent. In the above circumstances it was considered necessary as part of the agrarian reforms, to give relief to the cultivating tenants from the burden of discharging the arrears of rent on condition of payment of current rent due to the landlords and with that object,

2. (1929) 29 L.W. 613: A.I.R. 1929 Mad. 25.

*W.P. Nos 3282 of 1972: 463, 1135, 1802, 4100 and 5904 of 1973. 13th November, 1978.

the above Act was enacted. Section 3 of the Act provides for relief to the tenants regarding payment of arrears of rent outstanding on the 30th of June, 1971, provided the cultivating tenants deposited the whole current rent, that is, rent due for the fasli year commencing on the 1st of July, 1971 and ending with 30th June, 1972, within 6 months from the date of publication of the Act, that is on 11th August, 1972. Section 4 is a deeming provision under which if any cultivating tenant paid on or after 1st July, 1972 any rent to the landlord or deposited it into Court, it shall be deemed to be payment towards the current rent. Sub-section (3) of section 4 however disentitles any cultivating tenant to claim any refund from the landlord on the ground that the payment or deposit made on or after 1st July, 1971 towards the discharge of any arrears is in excess of the rent due as current rent. Section 5 prohibits any suit for recovery of arrears and for eviction of cultivating tenants within the period of six months from the date of publication of the Act. Section 7 provides for restoration of possession of land to cultivating tenants who have been evicted on or after 1st March, 1972 and before the publication of the Act on the ground of non-payment of rent, provided they paid the current rent Section 9 of the Act provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in certain statutes. The provisions set out show that the main object of the Act is to give an option to the tenant to pay the current rent within a specified period if he is to have the benefit of all the outstanding arrears getting wiped off. The Act does not wipe out the entire dues payable by the tenants compulsorily. [*Para.* 2.]

The Act provides ameliorative reliefs to the cultivating tenants with a view to enable them to concentrate on agriculture without being distracted by the proceedings that are likely to be initiated by the landlords for eviction or for recovery of arrears of rent from the tenants. It must be noted that under the impugned Act the tenants do not get an automatic discharge of the arrears due by them. An option is given to them and if they want to claim the benefits of the Act they are bound to pay a portion of the rent in arrears. Time is fixed for the exercise of the option. By exercising the option the burden of previous arrears gets discharged and thereafter the tenants can apply themselves earnestly to the cultivation of the lands and increase food production for the benefit of the public. Therefore the impugned measure can be taken to be a part of agrarian reform intended to better the conditions of agriculturists for lightening the burden on them of accumulated arrears of rent, and for securing a common benefit of increased agricultural production. Hence, the impugned provision must be taken to be a reasonable restriction within Article 19 (5) of the Constitution, [*Para.* 11.]

Cases referred to:—

Kunjukutty v. *State of Kerala*, (1973) 1 S.C.R 326: A.I.R. 1972 S.C. 2079; *United Provinces* v. *Atiqua Begum*, (1939-40) F.L.J (F.C.) 97: (1940) F.C.R. 110: 53 L.W. 397: (1941) 1 M.L.J. (Supp). 65; *Subbachariar* v. *State of Madras*, (1967) 1 M.L J. 206; *K.W. Estates* v. *State of Madras*, (1971) 2 M.L.J. (S.C.) 75: (1971) 2 An.W.R. (S.C.) 75: (1971) 2 S C.J. 324: (1971) 2 S.C.R. 790: A.I.R. 1971 S.C. 161.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court will be pleased to issue—

(1) a Writ of Declaration, declaring the provisions of the Tamil Nadu Cultivating Tenants, Arrears of Rent (Relief) Act (Madras Act XXI of 1972) in respect of A.O. No. 1114 of 1971 pending on the file of the 2rd Respondent as *ultra vires* (in W.P. No. 3282 of 1972);

(2) a Writ of Declaration declaring that the Act XXI of 1972—Tamil Nadu Cultivating Tenants, Arrears of Rent (Relief) Act of 1972 is invalid, void and inoperative (in W.P. No. 463 of 1973);

(3) a Writ of Prohibition, prohibiting the first Respondent herein from giving effect to the provisions of the Act XXI of 1972 in respect of the petitioner (in W.P. No. 1135 of 1973);

(4) a Writ of Declaration, declaring that the provisions of Act XXI of 1972, the Tamil Nadu Cultivating Tenants, Arears of Rent (Relief) Act, particularly sections 3, 4, 5 and 9 of the Act are null and void in so far as the petitioner is concerned and cannot affect his right to recover the arrears of rent from the second respondent and also to enforce his right for evicting the tenant under the Cultivating Tenants Protection Act (in W.P. No. 1802 of 1973);

(5) a writ of *certiorari* calling for the records pertaining to the order of the 2nd Respondent in O.P. No. 160 of 1972, dated 5th March, 1973 and to quash the said order (in W.P. No. 4100 of 1973); and

(6) a writ of Prohibition, prohibiting the 1st Respondent from giving effect to the provisions of the Tamil Nadu Act XXI of 1972 regarding S.F. No. 436/1 (1 acre 5 cents): S.F. No. 437 (1 acre 52 cents); S.F. No. 447/2 (1 acre 32 cents) in Chikkadasampalayam Village, Avanashi Taluk, Mettupalayam, covered in O.S. No. 535 of 1972 on the file of the Court of the Subordinate Judge, Coimbatore (in W.P. No. 5904 of 1973).

N. Srinivasan for *N.R. Chandran, V.R. Narayanaswamy, V. Shyamalam, V. Srinivasan, V. Natarajan,* and *K. Sarvabhauman,* for Petitioner.

T.S. Subramanian, R. Sundaralingam, R. Shanmugam, P.S. Ramachandran, S. Palaniswamy and the Government Pleader, for Respondents.

The Order of the Court was made by

Ramanujam, J. The petitioners in all these petitions are landlords who have let out their lands to tenants for cultivation and have either filed applications for eviction before the Revenue Court on the ground that the tenants have committed default in payment of the arrears of rent. All these petitions have been filed challenging the constitutional validity of the Tamil Nadu Cultivating Tenants' Arrears of Rent (Relief) Act, (Madras Act XXI of 1972), hereinafter referred to as the Act, on the ground that the provisions of the said Act are violative of Articles 14, 19 and 31 of the Constitution of India. According to them, the provisions of the Act practically liquidate the rights of the landlords and prevent eviction even when the tenants are admittedly in arrears, that the tenants who are in arrears for several years are entitled to continue in possession of the leasehold property if they pay the current rent alone, that no application for eviction can even be made for six months from the date of the publication of the Act, that even tenants who have been evicted are enabled to get restoration of possession merely on payment of the current rent, that the provisions of the Act which are drastic in nature and practically deprives the owners of the land of their lawful income from the properties, that while the owners are obliged to pay taxes and other rates to the State, they are deprived of the only income from which they can hope to meet those taxes and public charges and this virtually and in effect amounts to illegal confiscation of their properties.

2. Tamil Nadu Cultivating Tenants' Arrears of Rent (Relief) Act (Madras Act XXI of 1972) was passed by the State Legislature and received, the assent of the President on 9th August, 1972. The Act is intended to give relief to cultivating tenants in respect of certain arrears of rents. The preamble and the statement of objects and reasons of the Act which explains the necessity for the legislation state that the cultivating tenants have borrowed and added to their debts during the years of drought, that, they are not in a position to pay the arrears of rent due to indebtedness and poor economic conditions, that on account of default in the payment of arrears of rents, the landlords have initiated action against the cultivating tenants for eviction and for recovery of arrears of rent, and that in the interests of the general public and in order to obtain maximum advantage in the matter of production of food crops the cultivating tenants should be spared the distractions and expenditure involved in the litigation. In the above circumstances it was considered necessary as part of the agrarian reforms, to give relief to the cultivating tenants from the burden of discharging the arrears of rent on condition of payment of current rent due to the landlords and with that object, the above Act was enacted. Section 3 of the Act provides for relief to the tenants on payment of arrears of rent outstanding on the 30th June, 1971 provided the cultivating tenants deposit the whole current rent that is rent due for the fasli year commencing on the 1st of July, 1971 and ending with 30th June, 1972, within 6 months from the date of publication of the Act, that is on 11th August, 1972. Section 4 is a deeming provision under which if any cultivating tenant paid on or after 1st July, 1972 any rent to the landlord or deposited into Court, it shall be deemed to be payment towards the current rent. Sub-section (3) of section 4 however disentitled any cultivating tenant to claim any refund from the landlord on the ground that the payment or deposit made on or after 1st July, 1971. towards the discharge of any arrears is in excess of the rent due as current rent. Section 5 prohibits any suit for recovery of arrears and for eviction of cultivating tenants within the period of six months from the dete of publication of the Act. Section 7 provides for restoration of possession of land to cultivating tenants who have been evicted on or after 1st March, 1972, and before the publication of the Act on the ground of non-payment of rent, provided he pays the current rent. Section 9 of the Act provides that the pro-

visions of the Act shall have effect notwithstanding anything inconsistent therewith contained in certain statutes. The provisions referred to above show that the main object of the Act is to give an option to the tenant to pay the current rent within a specified period if he is to have the benefit of all the outstanding arrears getting wiped off. The Act does not wipe out the entire dues payable by the tenants compulsorily.

3. According to the petitioners the Act takes away the right of the landlord to receive arrears of rent which is definitely 'property' within the meaning of Article 19 (1) (*f*) of the Constitution, and such a right cannot be taken away except in certain circumstances and without paying compensation. Under the guise of this Act, it is said, the Government has only abolished all arrears of rent due by the tenants, but has also not given any exemption from land revenue, agricultural income-tax etc. It is also complained that the Act does not provide for any compensation payable to the landlords in respect of the arrears of rent which has been abolished or wiped out under the Act, that the Act is highly discriminatory and violative of Article 14 as it strikes only at a particular class of property-holders and that the provisions of the Act are violative of the fundamental right to hold property and to receive income therefrom as guaranteed under the Constitution. It is also stated by the petitioners that the reasons contained in the preamble as well as the statement of objects and reasons for enacting the legislation are neither true nor justify the deprivation of the landlords of their just dues from the tenants without any compensation, that the indebtedness of the tenant and the resultant inability to pay the arrears of rent is not a justification for depriving the landlord of his due share in the produce, that if the tenants are indebted, they can have the benefit of the Agriculturalists Debt Relief Act and that for failure of seasonal rains if the tenant was not able to realise the normal yield, he can obtain relief from the Revenue Court under the provisions of the Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Act, 1956. Further, during the time of drought it has been a normal and routine procedure adopted by the State remitting land revenue either wholly or in part for the relevant fasli year. It is also pointed out that in the face of the specific provisions in the Cultivating Tenants (Payment of Fair Rent) Act, 1956 there is hardly any justification for total confiscation of all the arrears of rent that would accrue to the landlord prior to 1st July, 1971. It is also stated that in the last few years the quality and quantity of food production has increased manifold in the State and the price of paddy and other agricultural produce had also increased by 50 per cent. over the years and the seasons have been favourable and that the cultivating tenants are in fact getting a high return. They have been also given protection from eviction from time to time, for non-payment of rent to the landlord from a certain period. Under the Tamil Nadu Act XVI of 1968 the tenants were given time for payment of arrears in instalments. Therefore the reasons given in the statement of objects and reasons for bringing in the Act, according to the petitioners cannot be relevant or germane and may not justify the wiping out of the arrears of rent due by the tenants to the landlords for the period prior to 1st July, 1971.

4. It is no doubt true that under the provisions of the Act if the current rent payable by a tenant to the landlord in respect of the demised land is paid within six months from the date of commencement of the Act, the tenants will not be liable to pay the balance of the arrears. The question is whether such a deprivation violates Article 19 (1) (*f*) and whether it is protected by Articles 31-A or 31-C.

5. According to the learned counsel for the petitioner the wiping out of the arrears, if the current rent is paid by the tenant, will amount to confiscation and it will therefore be violative of Article 19 (1) (*f*) of the Constitution. The petitioners also contend that the Act will not have the protection of Article 31-A as that provision covers only legislation for the acquisition by any State of estates or of any right therein as also legislation for the extinguishment and modifications of any rights in estates. The learned counsel for the petitioners refers to the decision of the Supreme Court in *Kunjukutty* v *State of Kerala*[1] and contends that in view of the said decision the impugned Act has to be struck down. It is pointed out that section 73 of the Kerala Land Reforms Act, 1964 providing for discharge of arrears of rent which is similar to section 3 of the impugned Tamil Nadu Act has been held to be violative of Article 19 (1) (*f*) of the Constitution as it was not entitled to

1. (1973) 1 S.C.R. 326; A.I.R. 1972 S.C. 2097.

the protection of Article 31-A of the Constitution. Section 73 of the Kerala Land Reforms Act, 1964, the constitutional validity of which was impugned in the *Kunjukutty's case*[1] reads as under:

"73. *Discharge of arrears of rent.*—(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, or in any contract, or in any judgment, decree or order of any Court or Tribunal, the landlord of a tenant specified in column (1) of the Table below shall be entitled to recover towards arrears of rent accrued due before the 1st day of May, 1958 and outstanding at the commencement of the Kerala Land Reforms (Amendment) Act, 1969, only the amount specified in the corresponding entry in column (2) of the Table:"

This provision was challenged before a Full Bench of the Kerala High Court on the ground that the liability to pay the arrears of rent is a debt and the liquidation of such a debt either wholly or in part cannot be said to be an agrarian reform, and even if it is necessary to rehabilitate indebted tenants by relieving them of their liability to pay the arrears of rent that must, like any other measure for relief of indebtedness, be justified as a reasonable restriction in the interest of the general public within the meaning of Article 19 (5) and that there is no material to show that it is reasonable. The majority opinion of the Full Bench was:

"The effect of section 73 is not merely to deprive the landlord of the charge conferred on him by section 42 but to wipe off the debt itself and this debt not being an interest in the land, it seems to us clear that the section cannot have the protection of Article 31-A. That protection is afforded only in so far as the acquisition, extinguishment or modification of rights in an estate are concerned. That is an essential element of agrarian reform and the so-called incidental or ancillary provisions can get the protection only in so far as they are necessary for effectively implementing the reform or are otherwise an integral part of the reform. The liquidation of debt due from tenants cannot be said to be necessary for implementing the law relating to the acquisition, extinguishment or modification of rights in estates or an integral part of that law and cannot therefore have the protection of Article 31-A".

The majority also held that the provisions in section 73 have not been shown to be a reasonable restriction in the interest of the general public so as to attract clause (5) of Article 19 and therefore the section is violative of Article 19 (1) (f). The said majority view was upheld by the Supreme Court. Their Lordships of the Supreme Court expressed:

"The liability to pay arrears of rent under the impugned Act, assuming the charge created by section 42 is an interest in land, is not a right in land, besides the liability being also a personal liability it would clearly amount to debt. Acquisition or extinguishment of such a personal liability for payment of money cannot be covered by Article 31-A. That money cannot be acquired is clear, as already pointed out, from the majority view of this Court's decision in *Kameswar Singh's case*[1] Looking at the table incorporated in section 73 it is obvious that the amount of rent to be paid for getting discharge of the whole debt has been arbitrarily fixed and does not seem to be founded on any rational, logical or just basis'..................... 'We grant that amelioration of indebtedness of tenants, is a laudable and desirable object. But the person to whom the arrears of rent are due is also entitled to seek protection of his legitimate right and if the acquisition of arrears of rent is outside the protection of Article 31 A then the impugned provision cannot but be held invalid. It *prima facie* partakes of the character of forfeiture or confiscation of the discharged arrears. Article 39 of the Constitution to which reference was made can be implemented by other permissible means without violating or abridging the just and legitimate rights of those to whom the arrears of rents are due. Section 73, therefore, in our opinion, was rightly struck down by the majority opinion'."

6. It is submitted by the learned counsel for the petitioners that the said decision of the Supreme Court applies on all fours to these cases and that in the face of that decision,

1. (1973) 1 S.C.R. 326: A.I.R. 1972 S.C. 2097.

1. 1952 S.C.R. 889.

the impugned Act cannot be held to be valid as its provisions violate Articles 14 and 19 (1) (*f*) and it does not get the protection of Article 31-A.

7. However, on a close perusal of the provisions of the impugned Act we are satisfied that there is considerable difference between section 73 of the Kerala Act and section 3 of the Tamil Nadu Act. There, there is an automatic wiping out of a portion of the arrears of rent and the landlord cannot recover any arrears of rent in excess of the amounts mentioned in the table set out in that section. Such a wiping out of arrears had been made as an agrarian reform in the Kerala Land Reforms Act of 1964. The preamble to the said Kerala Act says that the Act is intended to bring in a comprehensive legislation relating to land reforms in the State of Kerala. The Act does not purport to be one for amelioration of indebtedness of tenants. Further, the Supreme Court has accepted the following reasoning given by the majority of the Full Bench of the Kerala High Court:

> "Provisions for the fixation of fair rent have been in force throughout the State at least from 1964; and in the Malabar area, from much earlier. For may years past, seasons have been favourable and yields have been good. The prices of agricultural produce have been high, while rents, even when payable in kind, are commuted into money at rates much less than the prevailing prices, and it is notorious that cultivators of land have been making big profits even after paying rent. The mere fact that since 1957 the Legislature has from time to time thought fit to stay proceedings for the recovery of arrears of rent is not enough to show that tenants were not in a position to pay rent, and there is nothing to show that the arrears of rent accrued due are anything more than what the landowner can reasonably ask for his share or the tenant can reasonably be expected to pay. There were statutes in force by which, on the payment of rent for one year or more, the entire arrears could be discharged, and it does not seem to us either a reasonable restriction on the rights of the landlords, or something calculated to further the interests of the general public that persons who declined to take advantage of these statutes and would not pay when they could, should be absolved of the liability to pay their due debts."

It is for the above reasons the Supreme Court held that section 73 of the Kerala Act cannot be taken to be a reasonable restriction under Article 19 (5) of the Constitution and that the same is not also protected by Article 31-A. But the Tamil Nadu Act merely gives an option to the tenants to avail of the concession by paying the current dues within a specified period. This option has been given, as is clear from the objects and reasons given in the Act, to ameliorate the conditions of indebtedness of tenants so as to enable them to fully concentrate on cultivation and increased production. The remission of outstanding arrears of rent, if the current rent is paid, by the impugned Act has been done as part of a measure to ameliorate the conditions of agricultural indebtedness and it is the case of the State that but for the passing of the said Act there would have been large scale eviction of the cultivating tenants for non-payment of the arrears of rent leading to agrarian unrest and consequent decrease in the agricultural production. It is also the contention of the State that the impugned Tamil Nadu Act will come under the protection of Article 31-A of the Constitution or in any event it will be saved under Article 31-C.

8. There cannot be any dispute that the right of the landlords to collect the arrears of rent due to them from the tenants is affected by the provisions of the impugned Act. Therefore, unless those provisions could be justified as a reasonable restriction under Article 19 (5) of the Constitution, the same cannot be held to be valid. As already stated, the provisions of the Act give an option to the tenant to pay the current rent if he is to have the benefit of all the arrears of rent outstanding getting wiped off. The Act does not wipe out the entire dues payable by the tenants compulsorily. The said concession or benefit given to the tenants of paying the current rent to have the earlier arrears wiped out has been thought of by the Legislature in the interest of the general public to enable the cultivating tenants to spare themselves from the distractions and expenditure involved in defending actions by the landlords for recovery of arrears of rent or for eviction in order that the maximum advantage might result to the State in the matter of production of food crops. Having regard to the said object which has been specified in the objects and reasons set out the provisions of the Act have to be taken to be a reasonable restriction on the right of the landlords to recover the arrears of rent due by them or to evict the tenants for non-payment of rent.

9. Similar provisions occur in section 15 (1) of the Tamil Nadu Agriculturists Relief Act, 1938 (Tamil Nadu Act IV of 1938), section 55 (1) of the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Tamil Nadu Act XXVI of 1948), sub-section (2-A) (i) of section 56 of the Tamil Nadu Inam Estate (Abolition and Conversion into Ryotwari) Act. 1963 (Tamil Nadu Act XXVI of 1963), and section 41 (1) of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 (Tamil Nadu Act XXX of 1963). The validity of the provisions relating to remission of rent in the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948 was upheld by this Court in an unreported decision in *Raja Rao Suguna Kumaran* v. *State of Madras*[1]. In upholding the provisions of the said Act this Court observed as follows:

> "Obviously he (counsel for the petitioners) could not say that the arrears so wiped away were being acquired by the Government. So far as I understand him, his contention evidently was that the Legislature was not competent to enact such a provision. This ground is not open to the learned counsel in view of the decision of the Federal Court in *United Provinces* v *Atiqua Begum*[2] in which a similar provision was held to fall within the scope of Entry 21 in List II of Schedule 7 of the Government of India Act which included 'land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents.' In that case the United Provinces Government directed remission of rents in view of the unprecedented fall in the prices of agricultural produce. This remission was declared by the High Court unauthorised and inoperative. So in 1938 the Legislature passed an Act called the Regularisation, of Remission Act which precluded any question as to the validity of the orders of remission being raised in Courts. This Act was attacked as *ultra vires* of the Legislature and that it was not within the competence of the Provincial Legislature. It was held by the Federal Court that the impugned Act was a legislation with respect to the 'collection of rents' within the meaning of Entry 21, List II.....I have no doubt that legislation with respect to the remission of rents is a matter included in item 21."

1. C.M.P No. 781 of 1950 etc.
2. (1939) 40 F.L.J. (F.C.) 97: (1940) F.C.R. 110: 53 L.W. 397: (1941) 1 M L.J. (Supp.) 65.

10. The validity of a similar provision in section 56 (2-A) (*i*) of the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 was questioned in *Subbarhariar* v. *State of Madras*[1]. This Court upheld the provisions on the ground that the remission of rent was part of the agrarian reform and consequently the provisions enjoy the protection of Article 31-A of the Constitution. It was also held that the provision was within the competence of the State Legislature falling under Entry 18 of List II, and the relevant observations of the Court are as follows:

> "Now the field of legislation under Entry 18 of List II, covers relation of landlord and tenant and the collection of rents. There is no reason to limit the content of the Entry particularly the words 'the collection of rents'. It can well include remission of rents. It was observed by Gwyer, C.J. in the Federal Court in *Atiqua Begum's case*[2] which reference to Entry 21 of the Provincial List corresponding to the present Entry 18:—' The general descriptive words in item No. 21, include 'the collection of rents' and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection'. Clearly the impugned provision is within the legislative competence of the State and no question of colourable legislation can arise".

The above case went up in appeal to the Supreme Court and the Supreme Court upheld the provisions on the ground that they fall within the competence of the State Legislature. The Supreme Court observed:

> "It was next urged that the provisions in the impugned Acts reducing the liability of the tenants in the matter of payment of arrears of rent, whether decreed or not were beyond the legislative competency of the State. Those arrears are either arrears of rent or debts due from agriculturists. If they are treated as arrears of rent then the State Legislature had legisla-

1. (1967) I M.L.J. 206.
2. (1939-40) F.L.J. (F.C.) 97: (1940) F.C.R. 110: (1941) I M.L.J. (Suppl.) 65: 53 L.W. 397: A.I.R. 1941 F.C. 16.

tive power to legislate in respect of the same under Entry 18 of List II of the 7th Schedule. If they are considered as debts due from the agriculturists then the State Legislature had competence to legislate in respect of the same under Entry 30 of the same List"

In view of the above decision of the Supreme Court, the competence of the State Legislature to enact the impugned Tamil Nadu Act cannot at all be questioned. If the legislative competence cannot be questioned, then the only ground on which the validity of the Act could be questioned is that the benefits conferred on the tenants under section 3 which certainly affects the landlord's right to collect arrears of rent is not a reasonable restriction coming under Article 19 (5) of the Constitution.

11. The provisions of the impugned Act provides ameliorative reliefs to the cultivating tenants with a view to enable them to concentrate on agriculture without being distracted by the proceedings that are likely to be initiated by the landlords for eviction or for recovery of arrears of rent from the tenants. It must be noted that under the impugned Act the tenants do not get an automatic discharge of the arrears due by them. An option is given to them and if they want to claim the benefits of the Act they are bound to pay a portion of the rent in arrears. Time is fixed for the exercise of the option. By exercising the option the burden of previous arrears gets discharged and thereafter the tenants will apply themselves earnestly in the cultivation of the lands and increase food production for the benefit of the public. Therefore the impugned measure can be taken to be a part of agrarian reform intended to better the conditions of agriculturists who work on the land and of lightening the burden on them of accumulated arrears of rent, for securing a common benefit of increased agricultural production. Hence the impugned provision must be taken to be a reasonable restriction under Article 19 (5).

12. Though the State has also contended that in any event the impugned measure comes within the protection of Article 31-A based on the decision of the Supreme Court in *K.W. Estates* v. *State of Madras*[1] upholding the decision of this Court in *Subbachariar* v. *State of Madras*[1] we are of the view that the later decision in *Kunjukutty* v. *State of Kerala*[2] dealing with the provisions of the Kerala Land Reforms Act, 1964 seems to take a slightly different view. But it is not necessary for us to go into that question as we are clearly of the opinion that Article 31-C which was introduced by the Constitution 25th Amendment Act, 1971 with effect from 20th April, 1971 will clearly protect the impugned measure. Article 31-C as amended says that no law giving effect to the policy of the State towards securing all or any of the principles laid down in part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away, or abridges any of the rights conferred by Article 14, Article 19 or Article 31 and that no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy. The proviso says that any law made by the State Legislature to have the protection of Article 31-C should have received the assent of the President. As already stated, the impugned Act has received the assent of the President. According to Article 39-C, one of the Directive Principles of the State Policy is to see that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. If for non-payment of arrears of rent, the tenants are to be evicted from the lands and the lands revert to the landlords, it will result in the concentration of the lands which are the means of production with the landlords and this will lead to the loss of production in agricultural produce which will be to the common detriment.

13. One additional point raised in W.P. Nos. 1135 and 1802 of 1973 is that the tenants in those cases are raising cash crops such as plantain and sugarcane and that by raising such cash crops they have ceased to be covered by the provisions of the Cultivating Tenants Protection Act and therefore any arrears of rent due by them cannot be taken to be covered by the provisions of the impugned Act. It is true, section 15 of the Cultivating Tenants (Payment of Fair Rent) Act, 1956 says that persons raising cash crops such as sugarcane, plantain, betelvines will not be entitled to the benefit of that Act. That will

1. (1971) 2 M.L.J. (S.C.) 75: (1971) 2 An. W.R. (S.C.) 75: (1971) 2 S.C.J. 324: (1971) 2 S.C.R. 790: A.I.R. 1971 S.C. 161.

1. (1967) 1 M.L.J. 206.
2. (1973) 1 S.C.R. 326: A.I.R. 1972 S.C. 2097.

only mean that by raising cash crops they have ceased to be covered by that Act. The exemption provided under that Act is only for the purpose of that Act, and that will not enable the landlords to claim that the tenants are not cultivating tenants and therefore they are not entitled to the benefits of the impugned Act.

14. In the result, we uphold the validity of the Act and dismiss the writ petitions. There will, however, be no order as to costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

V.S. Valliappa Chettiar (deceased) and others .. *Petitioners**

v.

The State of Tamil Nadu represented by the Special Deputy Tahsildar (L.R.) No. III, Ramanathapuram at Madurai .. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land Act (LVIII of 1961), *section* 22—*Scope and applicability.*

A partnership firm made a statement before the Authorised Officer, under the Ceiling Act that lands which had been transferred to it by another firm could be included in its own ceiling limit and he need not proceed with the enquiry under section 22 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act. Those lands were included by the Authorised Officer within the ceiling limits of the transferees and the proceedings under section 22 were dropped. Notices under section 9 (2) (b) were issued to both the concerned firms on the footing that the properties held by both were joint family properties and after enquiry he declared 83.04 standard acres as surplus lands to be surrendered by those persons. On appeal before the Tribunal it was contended that the statement filed by the partners of the transferee firm was made in ignorance of law and on an erroneous impression that all transfers made between the date of commencement of the Act and the notified date are void and that the enquiry should have been conducted under section 22. The Tribunal rejected both the contentions.

On revision to the High Court,

Held: A duty is cast on the Authorised Officer under section 22 to find out whether the concerned transfers were such as would defeat any of the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act. It is a mandatory provision and the Authorised Officer has to follow the procedure laid down in section 22, strictly. An enquiry has to be held by the Authorised Officer under the section to find out whether the transfers were entered only with a view to defeat the provisions of the Act without *bona fide* intention to transfer title under the documents of transfer. That procedure has not been followed in this case. There is nothing on record to show that he has even dropped the proceedings under section 22. Nothing is mentioned about the enquiry under section 22. The Authorised Officer had not come to the conclusion that the transfers had the effect of defeating the provisions of the Act. On that view, the order of the Authorised Officer is not sustainable. The proper course to be adopted under such circumstances is to remit the matter to the Authorised Officer for an enquiry afresh.
[*Paras.* 6 *and* 7.]

The Revision is allowed and the order of the Land Tribunal set aside.

Case referred to:

Naganatha Ayyar v. *Authorised Officer,* (1971) 1 M.L.J. 274.

Petition under section 3 of Act LVIII of 1961 and 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Ramanathapuram at Madurai dated 3rd January, 1974 and made in Land Reform Appeal No. 8 of 1973. (M.R.I. No. 31/ V/ T P.R. on the file of the Authorised Officer (L.R.), Ramanathapuram at Madurai.

S V. Jayaraman and V. Kannan, for Petitioner.

The Additional Government Pleader, for Respondent.

The Court delivered the following

JUDGMENT:—This revision is against the order of the learned Land Tribunal confirming the order of the Authorised Officer (Land Reforms), Ramanathapuram and dismissing the appeal preferred by the revision petitioner,

*C.R.P. No. 371 of 1974. *22nd January,* 1979.

2. The facts are:—The estate called R.M P.V. Estate owned by late Palaniappa Chettiar of Poolankuruchi had extensive lands in Minnamalaipatti and Melavanniaruppu villages. After the death of the original owner Palaniappa Chettiar in the year 1920, his descendants were enjoying the income derived from the estate according to their shares. Some of the descendants of late Palaniappa Chettiar formed a new firm called V.S.R.M., but the Authorised Officer held that the properties owned by the new firm as well as R.M.P.V. firm are joint family properties. Some lands owned by the said estate were sold to V.S.R M. firm during the period between 6th April, 1960 and 2nd October, 1962. The partners of V.S.R.M. firm filed a joint statement before the Authorised Officer wherein theystated that the lands sold to V.S.R.M. firm could be included in their ceiling limit and one of the partners requested the Authorised Officer not to proceed with the enquiry under section 22 of the Land Reforms Act. Those lands mentioned in that petition were included within the ceiling limit of the said persons and the Authorised Officer dropped proceedings under section 22 of the Act. The learned Authorised Officer issued notice under section 9 (2) (*b*) of the Act to the partners of V.S.R.M. firm and also to R.M.P.V. Subramanian Chettiar and Muthukaruppi Achi who are also the descendants of Palainappa Chettiar for enquiry. The matter was enquired into and the Authorised Officer passed an order declaring 83.04 standard acres as surplus lands to be surrendered by these persons. Aggrieved by the said decision, they filed an appeal before the Land Tribunal who dismissed the appeal observing that "there are no merits in the appeal". It is against that order of the Tribunal that this revision is filed.

3 Two points were raised before the Tribunal and one was that the enquiry should have been conducted under the amended Act and the next point was that the statement filed by the partners of V.S.R.M. firm were not made voluntarily and that the partners were "under the erroneous impression that all the transfers made between the date of commencement of the Act and the notified date were void". Both these contentions were negatived by the Land Tribunal. Now, it is contended by the learned counsel Mr. S.V. Jayaraman, appearing for the revision petitioners that these admissions in the statement were made by the petitioners in ignorance of law and "on an erroneous impression that all transfers made between the date of commencement of the Act and the notified date are void' and as such, those statements can never be called voluntary statements so as to bind the petitioners. The learned counsel further contended that the Authorised Officer (Land Reforms) failed to note that the enquiry under section 22 was mandatory and that notwithstanding the statements made by the petitioners in regard to the alienations, the Authorised Officer ought to have proceeded with the enquiry under section 22 and should have determined whether the transfers would defeat the provisions of the Act.

4. It is necessary now to refer to the statement filed in this case (The statement at page 401 of the Authorised Officer's file, Vol. I is by Meenakshi Achi). The statement runs thus:

> "In reply to your above notice, I submit that I have sold the following lands to the persons mentioned therein under duly registered sale deeds. These sales of lands are *bona fide* and are not made contrary to the provisions of the Land Reforms Act. I agree that those lands may be included in the land which will form part of the ceiling area for which I am entitled under section 5 (1) of the Act. Necessary entries may be made and the sale of lands may be treated as valid. As I am willing to keep all the lands, sold after 6th April, 1960, within my ceiling limit, I request that the enquiry under section 22 need not be proceeded with".

5. To the same effect is the statement of Valliappa Chettiar and also of Chockalingam Chettiar, but Valliappa Chettiar and Chockalingam Chettiar have not stated that the enquiry under section 22 need not be proceeded with. Only Meenakshi Achi has stated so. The question is whether the Authorised Officer could drop the proceedings under section 22 of the Act.

6. It is pointed out that under section 22 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, the Authorised Officer is entitled to declare as void only those transfers which are sham and nominal, entered into with the avowed object of defeating the provisions of the Act without any *bona fide* intention to transfer title. I earlier extracted the statement

filed by the sharers. They have stated in their statements that "the sales of lands are *bona fide* and are not made contrary to the provisions of the Land Reforms Act". But, they added that they agree "that those lands may be included in the lands which will form part of the ceiling area for which they are entitled under section 5 (1) of the Act". In *Naganatha Ayyar* v. *Authorised Officer*[1] Ramanujam J., has observed:

"It is seen that there is no statutory provisions prohibiting any transfer expressly or by necessary implication either before or after the notified date. Even transfers made after the notified date which are likely to defeat the provisions of the Act have not been prohibited, nor declared void statutorily but the Authorised Officer is only authorised to declare the lands acquired by the transferee in excess of the ceiling area as having been transferred to the Government under the transfer......."

Then again, the learned Judge says:

"A close scrutiny of sections 19 to 21 shows that the main intention of the statute is to see that no person acquires land in excess of the ceiling area which he is entitled to hold under section 7, without invalidating the transfers as such. Read in that light section 22 cannot be construed as one intended to invalidate all transfers made between the commencement of the Act and before the notified date if they in fact defeat the provisions of the Act. If that were the intention of the Legislature, it would have used clearer language and would have stated that all transfers which defeat the provisions of the Act are void, leaving the authorities constituted under the Act to decide the question whether the transfers in fact defeat the provisions of the Act. Section 22 does not in terms invalidate such transfers effected after the commencement of the Act but authorises the Authorised Officer to declare the same to be void if it defeats the provisions of the Act."

These observations, with which I respectfully agree, clearly show that an enquiry has to be held by the Authorised Officer under section 22 to find out whether the transfers were entered into only with a view to defeat the Act without *bona fide* intention to transfer title under the documents of transfer.

1. (1971) 1 M.L.J. 274.

7. In *S. Narayanaswami* v. *State of Madras and the Authorised Officer, Land Reforms, Tiruchirapalli*[1], the learned Judges of the Division Bench observed:—

"Section 22 does confer upon the Authorised Officer having jurisdiction power to declare void alienations by way of sale among other terms of transfer made on or after the date of the commencement of the Act, but before the notified date, if he finds that the sales defeat any of the provisions of the Act. But before he made such a declaration there are two requisites which are mandatory. One is, he has to serve notice to all persons affected by such transfer by way of sale and secondly he has to make such enquiry as he thinks fit to make in order to find that the transfer was such as would defeat any of the provisions of the Act. These are two independent steps. Merely because notice was served but it was not responded, it does not follow that the second step can be dispensed with. The second step casts an obligation on the Authorised Officer to hold an enquiry as he thinks fit. The words "as he thinks fit to make" mean that a duty is cast on the Officer to hold an enquiry. It is no doubt discretionary. But the discretion has got to be exercised according to law and reason. In that sense there is a duty on the officer, even though the parties to whom notices were sent did not respond thereto to apply himself to the documents themselves, or by making some other investigation to gather facts in relation to the sales so that he would be in a position to appreciate the merits and hold that the sales were fictitious transactions, or they were not meant to be acted upon as they were bogus, or the documents were not supported by consideration. Even if the documents were not supported by consideration, the sales would be quite good. There may be several relevant considerations, which will have to be borne in mind and taken into account in the process of arriving at a finding whether the sales were intended to defeat any of the provisions of the Act. The policy of the law fixing the ceiling on landholding is to limit the extent of holding which means to that extent concentration of holding is directed to be fragmented. It is this policy which is the core of the purpose of the enactment, which has got to borne in mind in deciding

1. W.P No. 1699 of 1967.

the question whether the given sale deeds were intended to get over the ceiling. The procedure we have just now mentioned has not been adopted in this case."

Those observations also show that the provisions of section 22 have to be complied with strictly. It appears to me that the learned Authorised Officer erred in dropping the proceedings without considering whether the documents had the effect of defeating the provisions of the Act, because one of the partners had stated in her statement that the enquiry under section 22 need not be gone into. In *Naganatha Ayyar* v. *Authorised Officer*[1] earlier referred to the learned Judge further observed:

"Even assuming that section 22 applies even to genuine and *bona fide* transactions, if the transferor is inclined to treat the lands transferred by him during the interval within his ceiling area and declare his other lands as excess the Authorised Officer cannot declare it as void, for the transaction cannot be said to have been intended to defeat the provisions of the Act. This gives a clue as to the untenability of the submission made on behalf of the State that the statute in effect declares all transactions entered into during the interval having the effect of defeating the provisions of the Act void, that the Authorised Officer has no jurisdiction to go into the genuineness of the transaction and that he has to merely consider the question whether it defeats the provisions of the Act and if it did, to declare the same to be void."

It is therefore manifest that a duty is cast on the Authorised Officer to find out whether the transfer was such as would defeat any of the provisions of the Act. It is a mandatory provision and the Authorised Officer has to follow the procedure laid down in section 22. I earlier pointed out that only one of the partners has asked to drop the proceedings under section 22 and the other partners have not prayed to drop the proceedings. It has to be further noted that they do not say that the sales are void and were made in order to defeat the provisions of the Act, but they say that "the sales of the lands are *bona fide* and are not made contrary to the provisions of the Land Reforms Act." It is all the more necessary that the Authorised Officer should consider the question whether the transfer would defeat the provisions of the Act. The procedure has not been followed in this case. I do not find anything on record to show that he has even dropped the proceedings under section 22. Nothing is mentioned about the enquiry under section 22. He has not come to the conclusion that the transfers had the effect of defeating the provisions of the Act. On that view, the order of the Authorised Officer is not sustainable. The proper course to be adopted under such circumstances is to remit the matter to the Authorised Officer for an enquiry afresh. As I am of the view that the Authorised Officer should have proceeded with the enquiry under section 22 of the Act, I am abstaining from giving a finding as to whether the statements made by the partners were under the erroneous impression that all the transfers between the date of commencement of the Act and the notified date are void. The revision is allowed and the orders of the Land Tribunal and the Authorised Officer (Land Reforms), Ramnad at Madurai, are set aside and the matter is remitted to the Authorised Officer (Land Reforms), Ramnad at Madurai for hearing the petition afresh untramelled by any observation made in this order. The Authorised Officer will also admit the petition for reception of additional documents if any and take into consideration the additional documents filed, while dealing with the enquiry under section 22 of the Act. There will be no order as to costs in this revision.

R.S. ——— *Revision allowed.*

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1. (1971) 1 M.L.J. 274.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Thiagaraja Sendar .. *Appellant*.*

v.

Sri Pasupatheswararswami Devasthanam at Avoor represented by its Executive Officer, Thiru N. Panneerselvam .. *Respondent.*

Tamil Nadu Public Trusts (Regulation of Administration of Agricultural Lands) Act (LVII of 1961), section 51 (iv) — Suit land, a coconut tope, whether immune from the provisions of the Act.

The definition of "tope" does not exclude the cultivation of crops other than fruit or nut-bearing trees. It only emphasises that the land must contain a group of fruit or nut-bearing trees as constituting the main crop in that land. On the evidence on record, in the present case there was no doubt whatever that the suit land was predominantly a coconut tope. The evidence showed that in an area measuring 53 cents, there were as many as 48 coconut trees. [*Para.* 4.]

The question was whether the suit tope was immune from the protective provisions of the Act. Section 51 (*iv*) of the Tamil Nadu Act (LVII of 1961) is quite clear and says the Act shall not apply to such topes so long as they continue to be used for such purposes as are provided in the section. The expression "converted" occurring in section 51 (*iv*) of the Act is not a term of art and it has not been used in any technical sense by the Legislature and all that it means is that if the land once becomes a tope as defined in section 2 (29) of the Act, then the land must be regarded as having been converted into a tope as contemplated in section 51 (*iv*) of the Act, and it would fall outside the scope of the Act and it will only cease to be so exempt if the land becomes reconverted into something other than a tope. [*Para.* 6.]

Case referred to —

Sri Panchanatheswararswami Devasthanam v. *Barkis Bivi,* (1972) T.L.N.J. 591.

Appeal against the decree of the Court of the Subordinate Judge, at Kumbakonam in Appeal Suit No. 161 of 1973, preferred against the decree of the Court of the District Munsif of Kumbakonam in Original Suit No. 464 of 1972.

N. Sivamani, for Appellant.

N. Vanchinathan, for Respondent.

The Court delivered the following

JUDGMENT.— This second appeal raises a point about the application of the provisions of section 51 (*iv*) of the Tamil Nadu Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961, (Tamil Nadu Act LVII of 1961). The appellant Thiagaraja Sendar obtained a lease of a tope in Govindakudi village which belongs to Sri Pasupatheswararswami Devasthanam, Avur. The lease comprised two items, a punja land bearing R.S.No. 635 and a coconut tope bearing R.S.No. 612/3. We are concerned in this second appeal only with one item *viz.*, the tope. A lease deed was executed by the appellant in favour of the Devasthanam on 2nd December, 1964. It was also signed by the then Executive Officer of the Devasthanam. Under the lease deed, the appellant had to pay Rs.100 per year as rent for the coconut tope. The lease deed also provided that the appellant could utilise the inter-space in the tope for punja cultivation. The lease was for a period of three years from 1374 to 1376 faslis. Even subsequent to the expiry of the period of lease the appellant continued to be in occupation of the coconut tope, and he had been paying the rent as stipulated thereunder to the Devasthanam. Subsequently in July, 1972 the Devasthanam took proceedings for auctioning the usufructs of the coconut tope for faslis 1382 to 1384. The appellant issued a legal notice to the respondent-Devasthanam claiming that the intended reauction of the tope was not justified, since he was a cultivating tenant of the tope and could not be evicted therefrom. Following the suit notice, he filed a suit against the respondent/Devasthanam for a permanent injunction restraining them from interfering with his possession of the coconut tope. The Devasthanam entered appearance in the suit, and contended that what was leased out in favour of the appellant was only the right to appropriate the usufructs of the trees, and that, there was no lease of the land as such entitling the appellant to claim rights as a cultivating tenant. It was further pleaded that the provision in the lease deed which permitted the appellant to cultivate the tope for punja crops was an unauthorised act by the then Executive Officer and not binding on the Devasthanam.

*S.A.No. 786 of 1975. *17th October,* 1978.

2. The principal issue before the trial Court in the suit was whether the appellant was a cultivating tenant of the tope and entitled as such, to protection from eviction. At the trial, the appellant relied on the provisions of the Tamil Nadu Act LVII of 1961. Section 18 of the Act provided that no cultivating tenant under any public trust shall be evicted from his holding or any part thereof by or at the instance of the public trust. The learned District Munsif who tried this suit rejected the contentions put forward by the Devasthanam. On the issue of fact as to whether the lease was of the usufruct of the coconut trees alone or of the trees as well as the land inclusive, the learned District Munsif recorded a finding that the clause in the lease deed enabling the appellant to put the tope under punja cultivation was not a subsequent insertion in the lease deed as alleged by the Devasthanam, but was a part and parcel of the terms of the lease as agreed to between the parties. The learned District Munsif also held that the Executive Officer had authority to lease the land of the tope and not merely the usufructs of the trees. He accordingly held that the lease of the tope, as such, inclusive of the land was binding on the Devasthanam. On this basis, the learned District Munsif held that the appellant as cultivating tenant of the land was entitled to protection from eviction under the Act. He accordingly decreed the suit and issued a permanent injunction restraining the Devasthanam from interfering with the appellant's possession.

3. On appeal, by the Devasthanam, the Sub-Court, reversed the decision of the trial Court. In the appeal, reliance was placed on behalf of the Devasthanam, on the provisions of section 51 (*iv*) of the Tamil Nadu Act LVII of 1961. It was submitted on behalf of the Devasthanam that the suit tope fell within the category of land converted into tope and since it was common ground that it continued to be a tope at the material time, the provisions of section 51 (*iv*) of the Tamil Nadu Act LVII of 1961 would apply so as to exempt it from the protective provisions of the Act. The learned Subordinate Judge accepted this submission. He held that the suit tope answered the description contained in section 2 (29) of the Tamil Nadu Act LVII of 1961 and nonetheless so for the fact that the lease deed provided and permitted the appellant to raise the dry crops. On the evidence on record, he recorded a finding that the land had not ceased to be a coconut tope and continued to remain as such. As for the applicability of section 51 (*iv*) of the Act, the learned Subordinate Judge applied a ruling of Ismail, J., in a decision briefly reported in *Sri Panchanatheswararswami Devasthanam by its trustee* v. *Barkis Bivi*[1]. In the result, he held that the suit tope was exempt from the provisions of the Tamil Nadu Act LVII of 1961 and that the appellant had no right to injunct the Devasthanam from recovering possession of the suit tope.

4. In this second appeal preferred against the judgment and decree of the learned Subordinate Judge, Mr. Sivamani for the appellant contended that section 51 (*iv*) of the Tamil Nadu Act LVII of 1961 does not apply to the suit tope. I am, however, unable to accept this submission, both on a construction of the relevant provision and on the authority of the judgment of Ismail, J., to which I have earlier referred. The provision in question reads thus:

> *Section* 51—"*Exemption*: Nothing contained in this Act shall apply to—
>
> (*i*) * * *
>
> (*iv*) lands converted into orchards or topes or arecanut gardens, whether or not such lands are contiguous or scattered:
>
> Provided that such lands shall be exempt only so long as they continue to be orchards, topes, or coconut-gardens;"

"Tope' is defined under section 2 (29) of the Act in the following terms:

> "(29) 'tope' means any land containing group of fruit or nut-bearing trees including palmyrah trees, constituting the main crop in such land, whether of spontaneous or artificial growth and includes orchards, but does not include trees on such bunds as are not within or adjunct to such groups of trees."

The definition of "tope" does not exclude the cultivation of crops other than the fruit or nut-bearing trees. All it emphasises is that the land must contain a group of fruit or nut-bearing trees as constituting the main crop in that land. On the evidence on record, in this case, there can be no doubt whatever that the suit land is predominantly a coconut tope. The evidence shows that in an area measuring 53 cents, there are as many as 48 coconut

1. (1972) T.L.N.J. 591.

trees. The learned Subordinae Judge was, therefore, quite right in construing the land as a tope. In this context, the provision in the lease deed enabling the appellant to raise punja crops cannot militate against the land being continued to be regarded as a tope within the meaning of the statutory definition. There was some evidence in the case to the effect that the appellant raised some punja crops such as "karunai", "turmeric" and "red-gram". There was, however, doubt as to whether these crops were raised in the coconut tope itself. The learned Subordinate Judge doubted whether the inter-space between 48 coconut trees in the area of .53 acres could at all have permitted the raising of any such punja crops. But even assuming that these punja crops were, in fact, raised by the appellant, in the tope itself they cannot detract from the fact that the land is mainly or predominantly a coconut tope containing clusters of coconut-bearing trees. I am, therefore, satisfied that the suit tope answers the statutory description.

5. The only other question, therefore is, whether the suit tope is entitled to be immune from the protective provisions of the Act. Section 51 (*iv*) of the Tamil Nadu Act LVII of 1961, which I have already extracted is, quite clear on this subject. It says that the Act shall not apply to such topes so long as they continue to be used for such purposes as provided in this section.

6. At the time I heard arguments from the Bar, I entertained some little doubt as to whether section 51 (*iv*) applies only to the lands which had been "converted" into topes. I am however satisfied on deeper consideration that the definition admits of no doubt, having regard to what I consider with respect, to be a clear exposition of the meaning and scope of this provision by Ismail, J., in *Sri Panchanatheswarraswami Devasthanam by its trustee* v. *Barkis Bivi and others*[1]. The learned Judge in that case took the view that the expression "converted" occurring in section 51 (*iv*) is not a term of art and it has not been used in any technical sense by the Legislature and that all it meant is that if the land once becomes a tope as defined in section 2 (29) of the Act, then the land must be regarded as having been converted into a tope as contemplated in section 51 (*iv*) of the Act and it would fall outside the scope of the Act and it will only cease to be so exempt if the land becomes reconverted into something other than a tope. I adopt this view of Ismail, J., as my own. The learned Subordinate Judge's view based on the decision of Ismail, J., has, therefore, to be upheld as correct in law. For all the above reasons, this second appeal has to be dismissed and I accordingly do so. The judgment and decree of the learned Subordinate Judge are confirmed. There will, however, be no order as to costs.

1. (1972) T.L.N.J. 591.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—*S. Natarajan, J.*

V.S. Alwar Iyengar .. *Petitioner**

v.

Tahsildar and Record Officer, Srivilliputhur and others .. *Respondents.*

Tamil Nadu Agricultural Lands (Record of Tenancy Right) Act (X of 1969), *section* 16-*A* —*Preparation of Record of Tenancy Rights—Machinery under the Act has exclusive jurisdiction—Suit for injunction—Civil Court has jurisdiction to determine nature of tenant's possession incidentally —Decision not however to override section* 16-*A*.

In matters like the preparation of Record of Tenancy Rights, inclusion of the relevant items of land as well as the names of interested persons in the approved Record of Tenancy Rights and the modification of entries in the approved Record of Tenancy Rights, the machinery provided under the Act (X of 1969) will have exclusive jurisdiction and to that extent, the jurisdiction of the civil Courts has been taken away by means of the express interdiction contained in section 16-A, as held in *Muniyandi* v. *Rajangam Iyer*, (1976) 1 M.L.J. 344: 89 L.W. 249. On the other hand, for obtaining relief of injunction etc., resort could be had only to the civil Court and the powers of the civil Court to entertain a suit for injunction and grant orders of injunction etc., remain untouched by Act X of 1969. If, in the process of finding out whether a party is entitled to an order of injunction in his favour or not, it becomes

*W.P. No 3938 of 1977. *4th January*, 1976.

incidentally relevant to examine the nature of his possession, the civil Court can evaluate the status of that person. But, that finding can only be confined to granting or not granting the relief of injunction sought for and it cannot override section 16-A of the Act or take away the jurisdiction of the officers named in the Act to deal with applications directly arising under the provisions of Act X of 1969. [*Para.* 8.]

Cases referred to:—

K.S. Palaniswami v *Ramaswami Gounder*, (1977) 1 M.L J (S. N.) 5. *Muniyandi* v. *Rajangam Iyer*, (1976) 1 M.L.J. 344: 89 L.W. 249: A.I.R. 1976 Mad. 287; *Sankaralinga Thevar* v. *Thirumalammal*, (1977) 1 M.L.J. 189.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari*, calling for the records in K. Dis. 27522/77 dated 30th April, 1977 of the third respondent and quash the order, dated 30th April, 1977 and made therein.

R. Alagar, for Petitioner.

C. Chinnaswamy, for the Government Pleader and *M.S. Umapathy* for *Raj* and *Raj*, for Respondents.

The Court delivered the following

ORDER.—The oft-raised question whether the designated Revenue authorities are entitled to entertain applications under the Tamil Nadu Agricultural Lands (Record of Tenancy Right) Act, 1969 (hereinafter referred to as the Act) and pass orders thereon after the civil Courts had expressed their opinion in proceedings instituted before them about the status of an alleged cultivating tenant is the subject-matter of debate in this case. The brief facts which are required to be noticed for appreciating the contentions of the petitioner are as set out below:—

2. The petitioner is the owner of wet lands bearing Survey Nos. 682 and 683 situated in Maharajapuram Village, Srivilliputhur Taluk, Ramnad District. According to him the fourth respondent herein was permitted to carry out certain agricultural operations on those lands on a contractual basis under a written agreement dated 7th November, 1973. The agreement came to an end six months later and the accounts were settled and the fourth respondent's right to remain on the land came to a termination. Nonetheless the 4th respondent sent a notice in February, 1974 stating that he would cut and remove the standing crops on the land. To prevent this the petitioner filed a suit O.S. No. 309 of 1974 on the file of the District Munsif's Court, Srivilliputtur and prayed for a decree for permanent injunction to restrain the fourth respondent from interfering with the petitioner's possession and enjoyment of the suit property. While considering the petitioner's prayer for grant of permanent injunction, the trial Court determined the status of the fourth respondent as a contractual labourer and this finding coupled with the finding on the petitioner's possession of the land resulted in the trial Court passing a decree in favour of the petitioner. That judgment and decree were unsuccessfully challenged by the fourth respondent before the principal Subordinate Judge of Ramanathapuram at Madurai in A.S. No. 121 of 1975. After the disposal of the appeal the petitioner received notice of proceedings instituted by the fourth respondent before the first respondent for registration of his name as a tenant of the lands mentioned above in the record of tenancy rights. The petitioner opposed the application of the fourth respondent and relied upon the judgments of the civil Courts in his favour. The first respondent took the view that the determination of the status of the fourth respondent as a cultivating tenant was entirely within his domain and, therefore, refused to be influenced by the judgments of the civil Courts and considered and allowed the fourth respondent's application. This order was taken in appeal to the second respondent by the petitioner and the second respondent allowed the appeal and reversed the order of the first respondent. That led to the fourth respondent preferring a revision to the third respondent. The revisional authority deemed it fit to allow the revision and remand the matter to the first respondent for fresh disposal and gave a direction to the first respondent to send for the agreement, Exhibit A-2 entered into between the parties and examine that document also before deciding the question whether the fourth respondent was a cultivating tenant of the petitioner or not. Aggrieved by the order of remand the petitioner has preferred this petition and the prayer therein is for a writ of *certiorari* or other appropriate writ or order being issued to quash the order of the third respondent.

3 Before referring to the arguments of Mr. Alagar, learned counsel for the

petitioner, it may be mentioned that a second appeal preferred by the fourth respondent against the judgment of the learned Subordinate Judge of Ramanathapuram to this Court in S.A. No. 112 of 1977 also ended in failure and this Court dismissed the second appeal on 4th June, 1978. The resultant position is that the uniform finding of the Courts below as well as of this Court is that the petitioner is entitled to remain in undisturbed possession of the suit property and the fourth respondent who had only the status of a contractual labourer was not entitled to interfere with the petitioner's possession of the lands.

4. Mr. Alagar contends that having regard to the findings of the civil Courts in the various proceedings referred to above, it is no longer open to the fourth respondent to move respondents 1 to 3 for recognition of this status as a cultivating tenant of the lands belonging to the petitioner. According to the learned counsel the bar imposed by section 16-A of the Act will not have application to the petitioner's case because it is now well-settled that the civil Court has jurisdiction to entertain a suit as the one filed by the petitioner for obtaining the relief of injunction. For the purpose of granting injunction to the petitioner the civil Courts had also to incidentally determine the status of the fourth respondent and accordingly they have held that his status is only that of a contractual labourer. Such being the case the fourth respondent is not entitled to rake up the matter once again under the guise of an application under the Act, nor are the Officers empowered under the Act entitled to render a finding contrary to the earlier findings given by the civil Courts regarding the status of the fourth respondent, albeit in collateral proceedings. In support of his arguments Mr. Alagar relies on the decision in *K.S. Palaniswami* v. *Ramaswami Gounder*[1], where it has been held that though section 16-A of Tamil Nadu Act X of 1969 excludes the jurisdiction of the civil Courts to determine a question which the authorities constituted under the Act have to decide, yet a suit for mere injunction can well be maintained in the civil Court and it will be competent for the civil Court to incidentally determine, for the purpose of granting the main relief claimed in the suit, the capacity in which a person claims to be in possession. The further submission of Mr. Alagar is that the bar under section 1-A of the Act will have application only if a tenant had first approached the hierarchy of officials named in the Act to recognise him as a cultivating tenant and obtain an order in his favour before his status is decided, though incidentally, by the civil Court in proceedings instituted by a landlord for obtaining reliefs like injunction etc. As a logical extension of his arguments, the petitioner's counsel states that inasmuch as the petitioner had first moved the civil Court and obtained a decree for injunction in his favour and in the process of granting the relief of injunction the civil Courts have also determined the status of the fourth respondent, it is not now open for any of the respondents to say that the jurisdiction of the civil Courts is barred under section 16-A of the Act and it is open to respondents 1 to 3 to independently go into the question whether the fourth respondent is a cultivating tenant under the petitioner or not.

5. On the other hand, Mr. Umapathy, learned counsel appearing for the fourth respondent places strong reliance on section 16-A and contends that though the civil Court may have jurisdiction to grant the relief of injunction in a suit filed by a landlord, yet the Court cannot impinge upon the jurisdiction of the authorities contemplated under the Act in dealing with the claims of tenants for recognition as cultivating tenants and as such the bar placed on civil Courts by section 16-A from dealing with matters which are exclusively determinable by the authorities named in the Act will not cease to have force merely because a landlord forestalls a cultivating tenant and files a suit in a civil Court and gets a decree for injunction in his favour.

6. For a proper appreciation of the points raised in the debate it is necessary to consider the scope and effect of section 16-A and also some of the other provisions of the Act. Section 16-A reads as follows:—

> "16-A. *Bar of jurisdiction of civil Courts*:— No civil Court shall have jurisdiction in respect of any matter which the Record Officer, the District Collector or other officer or authority empowered by or under this Act has to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken by such officer or authority in pursuance of any power conferred by or under this Act."

Having regard to the terms of the section we must find out what are the matters in which the District Collector or other officer or autho-

1. (1977) 1 M.L.J. (S.N.) 5.

rity empowered by or under the Act has jurisdiction to determine. The matters in which they have been conferred jurisdiction are those dealt with by sections 3, 4 and 5. Section 3 deals with the preparation of record of tenancy rights and the procedure to be followed in the preparation of such records. Section 4 deals with inclusion of lands in the approved record of tenancy rights. Clause (a) of sub-section (1) of section 4 needs extraction because the fourth respondent's application to the first respondent would squarely fall under this provision. That provision is as follows:—

"Where subsequent to the publication of the approved record of tenancy rights any land has been let for cultivation, the landowner, intermediary or the tenant having interest in such land shall make an application to the Record Officer for inclusion of particulars relating to such land in the approved record of tenancy rights."

Then comes section 5 which provides for modification of entries in the approved record of tenancy rights. With reference to the matters covered by sections 3, 4 and 5, any one aggrieved by orders passed under those sections has been given a right of appeal under section 6 and a further right of revision under section 7 of the Act. Section 8 is a procedural section and it lays down that if any original order is varied by the appellate or revisional authority, suitable changes shall be made in the approved record of tenancy rights in accordance with the order passed in appeal or revision. It is not necessary to refer to the other sections of the Act because they are not relevant for consideration in this petition.

7. Construing the scope of section 16-A, it was held in *Muniyandi* v. *Rajangam Iyer*[1], by a Bench of this Court that section 16-A of Act X of 1969 admits of no doubt that a civil Court has no jurisdiction to decide any matter which the Record Officer, District Collector or other officer or authority empowered by or under the Act should determine. Another Bench of this Court held in *Sankaralinga Thevar* v. *Thirumalammal*[2], that the bar of jurisdiction on civil Courts imposed by section 16-A of the Act will have no application if the action before the civil Court had been instituted before section 16-A was enacted. It is therefore, with reference to the provisions of the Act and in the light of these decisions, the case of the petitioner has to be decided.

1. (1976) 1 M.L.J. 344; 89 L.W. 249: A.I.R. 1976 Mad. 287.

2. (1977) 1 M.L.J. 189.

8. It appears to me that there will not be any room for conflict if we construe the bar of jurisdiction imposed on civil Courts by section 16-A of the Act in its proper perspective. In matters like preparation of record of tenancy rights, inclusion of the relevant items of land as well as the names of interested persons in the approved record of tenancy rights and the modification of entries in the approved record of tenancy rights, the machinery provided under the Act will have exclusive jurisdiction and to that extent, the jurisdiction of the civil Courts has been taken away by means of the express interdiction contained in section 16-A, as held in *Muniyandi* v. *Rajangam Iyer*[1]. On the other hand, for obtaining reliefs of injunction etc., resort can be had only to the civil Court and the powers of the civil Court to entertain a suit for injunction and grant orders of injunction etc., remain untouched by Act X of 1969. If, in the process of finding out whether a party is entitled to an order of injunction in his favour or not, it becomes incidentally relevant to examine the nature of his possession, the civil Court can evaluate the status of that person. But, that finding can only be confined to granting or not granting the relief of injunction sought for and it cannot override section 16-A of the Act or take away the jurisdiction of the officers named in the Act to deal with applications directly arising under the provisions of Act X of 1969. If this state of things is borne in mind, there is no scope for the petitioner to contend that because the subordinate Courts and this Court have held that the petitioner was in possession of the land and was entitled to a decree for injunction in his favour and the fourth respondent was not entitled to disturb the possession of the petitioner as he was only a contractual labourer the fourth respondent has no right to initiate proceedings under Act X of 196· for recognition of his status as a cultivating tenant and likewise, the first respondent had no jurisdiction to entertain the application and pass orders in accordance with the materials placed before him for consideration. The determination of the status of the fourth respondent by the civil Court was with reference to the peti-

1. (1976) 1 M.L.J. 344: 89 L.W. 249.

tioner's claim that he was in actual, physical possession of the land and as such, he is entitled to retain his possession without let or hindrance, whereas the decision rendered by the first respondent on the application filed by the fourth respondent was with reference to his status in terms of Act X of 1969. I am therefore unable to accept the contentions of Mr. Alagar that the first respondent was not at all entitled to maintain the application filed by the fourth respondent, and, likewise, the third respondent was also not entitled to take on file the revision preferred by the fourth respondent and allow the same and remit the matter to the first respondent for fresh disposal.

9. It is also hesitantly contended by Mr. Alagar that in any event, the third respondent should have remanded the case to the second respondent only not to the first respondent for fresh disposal. I am unable to sustain this contention because the third respondent has, undoubtedly, got powers of remand and in exercise of that power, it is open to him to remit the matter either to the first respondent or to the second respondent to consider the matter anew. Inasmuch as the third respondent has taken the view that the initial authority, *viz.*, the first respondent, should decide the status of the parties after looking into the agreement, Exhibit A-2, relied upon by the petitioner, he has deemed it fit to remand the case to the first respondent instead of the second respondent. As such, there is no room whatever for the petitioner to have grievance on this aspect of the matter.

10. For the aforesaid reasons, the petition fails and accordingly, will stand dismissed. There will however be no order as to costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and G. Ramanujam, J.*

K. Somasundaram Pillai and others .. *Appellants**

v.

R. Dorairaj and others .. *Respondents*

Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), sections 3 and 15—Whole Inam village taken over by Government under the Act with effect from 15th April, 1965—Old waste and gramanatham—Lease of sites before the taking over by the landholder to several persons—Lessees putting up superstructures—Lessees undertaking to deliver possession of sites after removing superstructure whenever called upon—Eviction notices issued after expiry of lease periods—Suit by landholder for recovery of possession along with mesne profits—Suits decreed—Execution of decree by landholder—Plea by tenants of extinguishment of landholder's right except to the extent recognised by the Act—Landholder's right either to claim recovery of possession or mesne profits subsequent to date of notification challenged.

A conjoint reading of sections 3 and 15 of the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act indicates that though all lands in an inam estate including poramboke vest in the Government under section 3 (*b*) on the date of the notification of taking over of the estate and the interests of the landholder therein are completely extinguished, there is no such vesting in the Government and extinguishment of rights of the landholder under that section in the sites on which buildings have been erected either by the landholder or by any other person. Such sites have been separately dealt with in section 15. Under section 15, buildings belonging to the landholder which have been put to particular uses are dealt with in sub-sections (1) to (3). Sub-section (4) deals with buildings other than those referred to in sub-sections (1) to (3). As per sub-section (4) the building vests in the person who owned it immediately before the notified date. The definition of 'building' in sub-section (5) includes the site on which the building stands and the adjacent premises occupied as an appurtenance thereto. If the definition of 'building' in sub-section (5) is incorporated in sub-section (4) it will mean that the building and the site on which it

*L.P.A. Nos. 25 to 32 of 1975. *5th January*, 1979.

stands as also the site appurtenant thereto will vest in the owner of the building as and from the notified date, whether he be the landholder or any other person. However having regard to the object of section 15 (5) which is to effectuate sub-section (4), it can apply only to cases where the site will otherwise vest in the Government under section 3 (*b*) of the Act as part of the inam estate. If the landholder is taken to continue to own the site over which buildings have been built by the tenants notwithstanding the notification, it will be against the teeth of the general vesting contemplated in section 3 (*b*). He can avoid that vesting of the site only if he had put up the building himself and not when someone else had put up a building therein. He cannot take advantage of the existence of buildings put up by the tenants to claim that the site continues to vest in him. Section 3 (*b*) contemplates the vesting of all lands including grama natham. But an exception has been made in section 18 in respect of poramboke lands on which buildings had been erected, by treating such lands as part of the buildings and vesting them in the person owning the buildings. [*Paras.* 10, 15.]

It was not claimed in the instant cases that the sites over which superstructures had been erected by the tenants were part of the landlord's private property. Admittedly the land over which the superstructures had been erected was gramanatham which is a poramboke. Therefore there is no question of the landholder having ownership of the land after the notified date so as to make him to claim co-ownership with the tenants in respect of the buildings, which as a result of sub-section (5) includes the sites also. [*Para.* 16.]

Held, that the landholder had no right to claim recovery of possession or mesne profits subsequent to the date of notification.

Cases referred to:—

Sri Chidambara Vinayagar Devasthanam v. *Doraiswamy*, (1967) 2 M.L.J. 181; *C.V.S. Devasthanam* v. *Doraiswami Nadar*, (1971) 2 M.L.J. 278: 84 L.W. 492: A.I.R. 1971 Mad. 474.

Appeals under Clause 15 of the Letters Patent against the decree and judgment of Mr. Justice Venkataraman, dated 23rd August, 1972 and made in S. A. No. 172 of 1970, S. A. No. 171 of 1970, S. A. No. 169 of 1970, C. M. S. A. No. 122 of 1969, C.M.S.A. No. 7 of 1970, S. A. No. 168 of 1970, C.M.S.A. No. 8 of 1970, and S. A. No. 170 of 1970, preferred to the High Court against the order and judgment of the District Judge, West Thanjavur at Thanjavur and made in A. S. No. 104 of 1969, A. S. No. 103 of 1969, A. S. No. 101 of 1969, C M. S. A. No. 72 of 1968, C. M. S. A. No. 73 of 1968, A. S. No. 100 of 1969, C. M. A. No. 74 of 1968 and A. S. No. 102 of 1969, respectively (against the judgment and orders of the District Munsif of Pattukottai and made in O. S. No. 92 of 1968, O. S. No. 91 of 1968, O. S. No. 89 of 1968, E. P. No. 121 of 1968, in O. S. No. 103 of 1965, E. P. No. 117 in O. S. No. 104 of 1965, O. S. No. 88 of 1968, E. P. No. 120 of 1968 in O. S. No. 100 of 1965 and O. S. No. 90 of 1968 respectively.

K. Sarvabhauman and *T. R. Mani*, for Appellant.

P. Jayaraman, for Respondent.

The Judgment of the Court was delivered by

Ramanujam, J.—All these eight appeals which have been filed on the basis of leave granted under Clause 15 of the Letters Patent, arise out of a common judgment rendered by Venkataraman, J., in 8 appeals of which 5 are Second Appeals and 3 are Civil Miscellaneous Second Appeals.

2. The Second Appeals arose out of O. S. Nos. 88 to 92 of 1968 filed for possession of certain properties, arrears of rent and future mesne profits on the file of the District Munsif, Pudukottai. The Civil Miscellaneous Second Appeals arise out of three execution petitions filed for execution of the decrees obtained in another set of three suits, O. S. Nos. 103, 104 and 106 of 1965 on the file of the same District Munsif's Court. Since the facts are more or less identical in all these matters, it is not necessary to deal with the facts in each case. All these suits related to certain vacant sites in the village of Avidainalla Vijayapuram. It is a whole inam village taken over by the Government with effect from 15th April, 1965 under the provisions of the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1963, hereinafter referred to as the Act. The sites involved in these cases are comprised in Survey No. 157/1 and 158 / 1 of the same village. As per the village records, Survey No. 157 / 1 is an old waste and S. No. 158 / 1 is a gramanatham. The entire village belonged to the landholder of the village, one Dorairaj, the respondent herein and before the said Act came into

force, he had leased out the said sites to several persons, hereinafter referred to as tenants, and they had executed lease deeds agreeing to pay rent and also to deliver possession of the sites after removing the superstructures, if any, put up by them whenever called upon. After the expiry of the periods fixed in the various lease deeds executed by the tenants, the respondent issued quit notices to them and then filed several suits in the Court of the District Munsif, Pudukottai for recovery of possession along with mesne profits.

3. Three of such suits were O. S. Nos. 103, 104 and 106 of 1965. In O. S. Nos. 104 and 106 of 1965 decrees were passed by consent on 15th March, 1965 and 9th March, 1965 respectively on the tenants agreeing to deliver the properties within three months. In O. S. No. 103 of 1965, a decree for possession was passed by consent on 27th April, 1965. The respondent filed execution petitions, E. P. Nos. 117, 120, 121 of 1968 in O. S. Nos. 104, 106 and 103 of 1965 respectively. The tenants resisted these execution petitions *inter alia* on the ground that the decrees could not be executed because the village has been taken over by the Government on 15th April, 1965 under the provisions of the Act, as such the landholder's right in the entire estate including the suit sites had been extinguished except to the extent to which they were recognised under the Act, that under section 15 (4) and (5) of the Act, the superstructures put up by them as well as the sites on which the superstructures had been erected stood vested in the respective tenants, and that they were liable to pay the assessment as also the rent which they had been previously paying to the landholder only to the Government. In support of their contention they relied on the decision of Natesan, J., in *Sri Chidambara Vinayagar Devasthanam* v. *Doraiswamy*.[1] The executing Court, however, held that the notification of the Government under the Act had not brought about any change regarding the executability of the consent decrees passed in O. S. Nos. 104 and 106 of 1965 earlier to the date of the notification and that the decision of Natesan, J., will not apply to the facts of those cases. It therefore ordered delivery in E. P. Nos. 117 and 120 of 1968. So far as E. P. No. 121 of 1968 was concerned, the Court held that as the decree itself had been passed after 15th April, 1965, the notified date, it will operate as *res judicata* as against the tenant's claim for benefit under the Act as he had not claimed such benefit before the consent decree was passed in the suit and in that view that execution petition was also ordered.

1. (1967) 2 M.L.J. 181.

4. The tenants filed Civil Miscellaneous Appeal Nos. 72, 73 and 74 of 1968 on the file of the District Judge, West Thanjavur, against the orders passed by the executing Court in E.P. Nos. 121, 117 and 120 respectively. The learned District Judge upheld the order of delivery passed by the executing Court in E.P. No. 121 of 1968 but set aside the order for delivery in E.P. Nos. 117 and 120 of 1968 on the ground that the decrees sought to be executed had become inexecutable as the superstructures and the site had subsequently vested in the tenants on 15th April, 1965, the date of notification. The tenant filed C.M.S.A. No. 122 of 1969 against the order of delivery passed in E.P. No. 121 of 1968 and the landholder filed C.M.S.A. Nos. 7 and 8 of 1970 against the dismissal of E.P. Nos. 117 and 120 of 1968.

5. In the meanwhile the landholder filed five suits, O.S. Nos. 88 to 92 of 1968 against another set of tenants for recovery of possession, arrears of rent and future mesne profits in respect of certain other sites on which the tenants have put up superstructures. The said suits were resisted by the tenants on the ground that the rights of the landholder in the sites leased out to them having been extinguished by virtue of the notification issued under the Act as and from the notified date, the suits are not maintainable. The trial Court, however, decreed the suits. On appeal by the tenants, the District Court reversed that decision and dismissed the suits. The landholder therefore filed Second Appeal Nos. 168 to 172 of 1970 before this Court.

6. The Second Appeals filed by the landholders and the Civil Miscellaneous Second Appeal referred to above were heard together and a common judgment was rendered by Venkataraman, J. The learned Judge, purporting to follow the decision of a Division Bench of this Court in *C.V.S. Devasthanam* v. *Doraiswami Nadar*[1] held that since the superstructure did not belong to the landholder and as the sites cannot vest in the tenants along with their buildings, the ownership of the site should no.

1. (1971) 2 M.L.J. 278: 84 L.W. 492: A.I.R. 1971 Mad. 474.

be taken to have been extinguished under the provisions of the Act and therefore the land-holder is entitled to maintain the suits and the execution petitions. In that view the learned Judge allowed C.M.S.A. Nos. 7 and 8 of 1970 and dismissed C.M.S.A. No. 122 of 1969. The second appeals were also allowed, the decrees passed by the trial Court restored. Against the decision of Venkataraman, J., the above Letters Patent Appeals have been filed.

7. According to the learned counsel for the appellants the decision of Venkataraman, J., is not in accordance with law and it cannot therefore be sustained. The learned counsel for the respondent however submits that the decision under appeal is in consonance with the view taken by the Division Bench in *C.V.S. Devasthanam* v. *Doraiswami Nadar*.[1] and that, therefore, it does not suffer from any infirmity.

8. There is no dispute as to the facts set out above. The respondent was admittedly the landholder and the appellants were his tenants in respect of the suit sites over which they have put up superstructures. That the village in which the sites are situate has been taken over by the Government under the Act is also not in dispute. The only controversy between the parties is as to whether the land-holder's right in the sites leased out to the tenants had been extinguished by the taking over of the village under the provisions of the Act. If there is such an extinguishment, the landholder cannot seek any relief by way of delivery of possession or recovery of future mesne profits subsequent to the notified date. If there is no such extinguishment, the respondent will be entitled to maintain the suits for the above reliefs. This controversy has to be resolved with reference to the relevant provisions of the Act.

9. As per its preamble, Act XXVI of 1963 has been enacted for the acquisition of the rights of landholders in inam estates in the State of Tamil Nadu and the introduction of the ryotwari settlement in such estates. Section 3 (*b*) of the Act says that the entire inam estate (including all communal lands and porambokes, other non-ryoti lands, waste lands, pasture lands, forests etc., shall stand transferred to the Government and vest in them, free of all encumbrances. Clause (*c*) says that all rights and interests created in or over the inam estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine. Clause (*e*) provides that the landholder whose rights stand transferred under clause (*b*) or cease and determine under clause (*c*) shall be entitled only to such rights and privileges as are recognised or conferred on him by or under the Act. Clause (*g*) states that the rights and privileges which have been acquired in the inam estate by any person before the notified date, against the landholder, shall cease and determine, and shall not be enforceable against the Government or such landholder, and every such person shall be entitled only to such rights and privileges as are recognised or conferred on him by or under the Act. Section 15 deals with vesting of buildings situated in an inam estate, taken over under the Act. Sub-section (1) of section 15 provides that every building situated within the limits of an inam estate, which immediately before the notified date, belonged to any landholder or was being used by him as an office in connection with its administration and for no other purpose, shall vest in the Government free of all encumbrances with effect from the notified date. Sub-section (2) says that every building so situated which, immediately before the notified date, belonged to any such landholder and was being wholly or principally used for the occupation of any religious, educational or charitable institution, shall also vest in the Government as and from the notified date. Sub-section (4) says that every building **other than a building referred to in sub-sections (1) (2) and (3), shall with effect from the notified date vest in the person who owned it immediately before that date, but the Government shall be entitled in every case to levy appropriate assessment thereon and in case of a building which vests in a person other than a landholder also to the payments which such person was liable immediately before the notified date to make to any landholder in respect thereof, Sub-section (5) defines 'building' as including the site on which it stands and any adjacent premises occupied as an appurtenance thereto. Sub-section (6) says that if any question arises whether any building or land falls or does not fall within the scope of sub-sections (1) to sub- section (5), it shall be referred to the Government whose decision shall be final.**

10. A conjoint reading of sections 3 and 15 of the Act indicates that though all lands in an inam estate including porambokes vest in the Government under section 3 (*b*) on the

1. (1971) 2 M.L.J. 278 : 84 L.W. 492.

date of the notification of taking over of the estate and the interests of the landholder therein are completely extinguished, there is no such vesting in the Government and extinguishment of rights of the landholder under that section in the sites over which buildings have been erected either by the landholder or by any other person. Such sites have been separately dealt within section 15. Under section 15 buildings belonging to the landholder which have been put to particular uses are dealt with in sub-sections (1) to (3). Sub-section (4) deals with buildings other than those referred to in sub-sections (1) to (3). As per sub-section (4) the building vests in the person who owned it immediately before the notified date. The definition of the building in sub-section (5) includes the site on which the building stands and the adjacent premises occupied as appurtenant thereto. If the definition of 'building' in sub-section (5) is incorporated in sub-section (4) it will mean that the building and the site on which it stands as also the site appurtenant thereto will vest in the owner of the building as and from the notified date, whether he be the landholder or any other person. However, having regard to the object of section 15 (5) which is to effectuate sub-section (4), it can apply only to cases where the site would otherwise vest in the Government under section 3 (*b*) of the Act as part of the inam estate.

11. Construing a similar provision (section 18 of Tamil Nadu Act XXVI of 1948) Veeraswami, J. (as he then was), in *V.V. Venkatasubramania Pillai* v. *The Board of Revenue by the Commissioner of Settlements, Madras and others*[1] took the view that though the effect of section 18 (5) would undoubtedly be that the owner of the building falling within the ambit of section 18 (4) would also be entitled to the site on which the building stands, in cases where the site would otherwise have vested in the Government in pursuance of a notification under section 3 it is not intended to divest the title of a private owner to the site and vest it in the owner of the building on the site, and that section 18 (4) does not appear to contemplate a case where the building belongs to one person and the site on which it stands to another who is not a landholder. According to the learned Judge section 18 will apply only to cases where the building which belongs to an individual, is on a site which but for that section would have vested in the State Government upon a notification under section 3 and not to cases where the sites are not owned by the landholders. The same provision came up for consideration in *Sri Chidambara Vinayagar Devasthanam* v. *Duraiswami*[1]. In that case the landholder sued the tenant for rent in respect of the site let out prior to 1948 for building purposes. The site was situated in a village which had been taken over under the Tamil Nadu Act XXVI of 1948. On the date of taking over, the building continued to be in the occupation of the tenant. The tenant's defence to the suit was that under the provisions of the said Act the site along with the building had vested in him and that the title of the landholder to the site got extinguished. The Courts below held that the landholder had lost his right to the site as and from the date of the notification and therefore he was not entitled to claim any rent for the site from the tenant. Natesan, J., expressed the view that where a landholder has leased out a site for building purposes he cannot claim the superstructure built by the tenant as vesting him as part of the site or claim the site as part of the building, and sub-section (5) of section 18 (corresponding to sub-section (5) of section 15 of the Act) does not confer any new or special right on the landholder when he is not the owner of the superstructure, that it is only for the purpose of vesting that is provided for under section 18 (4) the building is made to include the site on which it stands, and that so far as the landholder is concerned *co instanti* with the notification of the estate he loses all interest in the estate, and therefore, his interest in the estate on which the building stands, of which he is not the owner is extinguished. The relevant observations of Natesan, J., are extracted below:

> "The object of the Abolition Act is to introduce Ryotwari Settlement in estates. The landholder in his right as the proprietor of the estate might have granted on lease sites to tenants and others for building purposes for rent. Under the Ryotwari Settlement introduced by the Abolition Act, the Government takes the place of the proprietor and vests the site in ownership with the owners of the buildings subject to their paying proper assessment on the sites. The landholder is compensated under the Act for the deprivation of his interests in the

1. W.P. No. 732 of 1961.

1. (1967) 2 M.L.J. 181.

estate. Viewed in this perspective, little room is left for subtle arguments that the proprietor having provided sites for the building must be deemed to be a co-owner with the owner of the superstructure of the building and the premises as such would be held in joint ownership, the proprietor as the owner of the site and the tenant, the superstructure. In my understanding of the section, the two questions that arise under it, one who owns the building and two, what goes with the building, must be kept distinct."

12. The said view of Natesan, J. was challenged before a Division Bench consisting of Veeraswami, CJ., and Raghavan, J. The Bench took the view that the definition of a building contained in section 18 (5) when incorporated in sub-section (4) would have the consequence that the building as well as the site on which it stood both vest in the person, owning the building, but however, if the landholder even after the notified date continued in possession of the land, such possessory title would entitle him to demand and collect the rent from the tenant. In that view the matter was remitted to the trial Court for finding out whether the landholder continued to be in pessession of the site on which the building stood after the notified date and if it is found to be so, to decree the suit. It is this decision which has been followed by Venkataraman, J., for allowing the appeals before him in the judgments under appeal. According to Venkataraman, J., as the view of Natesan, J., has been reversed by the Division Bench, the sites over which the tenants have put up buildings should continue to vest in the landholder. However, a close perusal of the judgment of the Division Bench indicates that the Bench in fact accepted the view of Natesan, J. The following passage in the judgment of the Bench makes this clear:

"The result of sub-section (5) to our mind is that the definition contained therein when incorporated in sub-section (4) would have this consequence, that, if the building as well as the site on which it stands both belong to the same person upon the notification, both of them will vest in that person. That, we think is the true scope of sub-sections (4) and (5) read together. These provisions do not contemplate a transfer of the ownership of the site to the owner of the building where it had not already belonged to him. Unless there is a coalescence of the ownership of the building as well as of the site on which it stands, there will be no vesting under sub-section (4). That is the view Natesan, J., took and we agree with him."

13. It is true the passage contains an observation about the necessity for coalescence of the ownership of the building and of the site in the same person for the application of section 15 (4). But that observation is to be understood with reference to a case where the site is not owned by a landholder and as such there is no question of its vesting under section 3 (*b*). Obviously in such a case there is no transfer of ownership of the site to the owner of the building. The fact that the Bench has agreed with the view of Natesan, J. indicates it has agreed with the opinion expressed by him that where the site in an inam estate has been built upon by the tenants, before the date of the notification, the site will not vest in the Government but will vest in the tenants. The matter, however, came to be remitted in that case by the Division Bench only on the basis that even a trespasser who is in possession is entitled to it except as against the lawful owner and that the possessory title if any, held by the landholder subsequent to the date of notification will enable him to maintain a suit for rent.

14. The view we have taken above on an interpretation of sub-section (4) read with sub-section (5) of section 15 is consistent with the view taken by the Division Bench in *C. V. S. Devasthanam* v. *Duraiswamy Nadar*,[1] on the interpretation of section 18 of the Act XXVI of 1948. In the judgment under appeal, Venkataraman, J., held that the landholder is entitled to maintain the suits on the basis of the view taken by the Division Bench. We do not see how the said decision would help the landholder (respondent) in these cases. It has not been alleged by the landholder that he was in possession of either of the site or the building at any time subseqnent to the notified date. He has also not disputed that the tenants have been in possession of both the superstructure and the site before and after the date of the notification. Therefore, there is no question of any enquiry as to whether the landholder was in possession of either the site or the superstructure after the date of the notification.

15. Mr. Parasaran, learned counsel for the respondent would submit that the purpose of

1. (1971) 2 M.L.J. 278: 84 LW. 492.

section 15 (5) is only to avoid the vesting under section 3 (*b*) in the Government of a site over which superstructure has been created and not to vest the ownership of the site with the tenant who owns the superstructure, that as such the ownership of the site should continue to vest in the landholder, that in such an event the landholder as well as the tenants in these cases will become co-owners of the property comprising of the site and the building and that therefore the rights *inter se* between the landholder and the tenant, in these cases have to be decided by the Civil Court on the basis of the general law relating to co-owners. We are of the view that such a construction of sub-section (5) will defeat the very object of the Act which is to acquire the rights of landholders in inam estates. If the landholder is taken to continue to own the site over which buildings have been built by the tenants notwithstanding the notification, it will be against the teeth of the general vesting contemplated in section 3 (*b*). He can avoid that vesting of the site only if he had put up the building and not when someone else had put up a building thereon. He cannot take advantage of the existence of buildings put up by the tenants to claim that the site continues to vest in him. Section 3 (*b*) contemplates the vesting of all lands including grama natham. But an exception has been made in section 18 in respect of poramboke lands on which buildings had been erected, by treating such lands as part of the buildings and vesting them in the person owning the buildings.

16. It is not claimed in these cases that the site over which the superstructure has been erected by the tenants is part of the landholder's private property. Admittedly the land over which superstructures have been erected is gramanatham which is a poramboke. Therefore there is no question of the landholder having ownership of the land after the notified date so as to enable him to claim co-ownership with the tenants in respect of the buildings, which, as a result of sub-section (5) includes the site also. We are therefore of the view that the landholder has no right either the claim recovery of possession or mesne profits subsequent to 15th April, 1965, the date of notification. Hence we allow the Letters Patent Appeals and set aside the judgment of Venkataraman, J. There will, however, be no order as to costs.

R.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Chengayya .. *Petitioner**

v.

M. V. Swaminatha Mudaliar and others .. *Respondents.*

(*A*) *Provincial Insolvency Act* (*V of* 1920), *section* 68 —"*Person aggrieved*"—*Meaning of.*

(B) *Provincial Inolvency Act* (*V of* 1920), *section* 75 —*Power of Court in revision.*

A shareholder of a creditor company under voluntary liquidation can seek the process under section 68 of the Provincial Insolvency Act as a "person aggrieved" and will come within the ambit of the expression "any other person ....aggrieved" under section 68 of the Act. [*Para.* 13.]

The powers of revision under section 75 (1) of the Provincial Insolvency Act are narrow and interference is possible only on a question of law. The findings of fact rendered by the Tribunal created under the Act are findings which are final as provided for in section 75(1) itself. [*Para.* 15.]

Cases referred to:—

Sayyad Khasim Sahib v. *The Official Receiver, Guntur*, (1945) 2 M.L.J. 553: 58 L.W. 641: A.I.R. 1946 Mad. 89; *Hanseswar Ghosh* v. *Rakhal Das Ghose*, (1913) 20 I.C. 683 (2); *Venkata Krishna Ayyar* v *Official Receiver*, (1950) 1 M.L.J. 15: (1950) L.W. 47 (2): A.I.R. 1950 Mad. 311; *Ramaswami Reddiar* v. *Official Receiver, South Arcot*, (1941) 2 M.L.J. 382: 54 L.W. 215: A.I.R. 1941 Mad. 827; *Kasi Chettiar* v. *Secretary of State*, (1941) 53 L.W. 479: (1941) 1 M.L.J. 531: A.I.R. 1941 Mad. 577; *Vaidyanatha Ayyar* v. *The Indian Bank Ltd.*, (1955) 2 M.L.J. 99: 68 L.W. 330: A.I.R. 1955 Mad. 486; *Kuttalingam* v. *Chinnakannu*, (1957) 2 M.L.J. 506: 70 L.W. 910: 28 Comp. Case. 168: A.I.R. 1958 Mad. 260; *Shyamlal* v. *Jagannath*, A.I.R. 1969 Cal. 424; *Belli Gouder* v. *Govindan*, (1970) 2 M.L.J. 303; *Srinivasa Naicker* v. *Engammal*, A.I.R. 1962 S.C. 1141; *Narayanan* v. *Kannabiran Mudaliyar*, (1974) 2 M.L.J. 303; *Malini Naickar* v. *Seth Mangharaj*, (1969) 2 S.C.J. 831: (1970) 1 M.L.J. (S.C.) 1:

* C.R.P.No. 1091 of 1975. *3rd March*, 1978.

(1970) 1 An. W.R. (S.C.) 1: (1969) 3 S.C.R. 898: A.I.R. 1969 S.C. 1344; *District Official Receiver* v. *Lakshmi Ammal*, (1974) 2 M.L.J. 397.

Petition under section 75 (1) of the Provincial Insolvency Act praying the High Court to revise the order of the District Court of North Arcot at Vellore dated 6th January, 1975 and made in C.M.A. No. 50 of 1974 (I.A. No. 39 of 1973 in Insolvency Petition No. 8 of 1968 Sub-Court, Vellore).

M. N. Padmanabhan, for Petitioner.

P. Sivaramakrishniah and *T. K. Seshadri*, for 1st Respondent.

The Court made the following

ORDER:—The question that comes up for consideration in this revision is with reference to the scope and import of the expression "any other person....aggrieved" occurring in section 68 of the Provincial Insolvency Act (V of 1920) hereinafter referred to as the Act.

2. The question arises under the following circumstances. A concern by name Sivanandam Palayakot Company, Gudiyatham, which is under voluntary liquidation, filed C.S. No. 14 of 1947 on the Original Side of this Court against A. Kaliappan, the second respondent herein, to recover a sum of Rs. 1,61,000 and obtained a decree. In execution of that decree, the house property of the judgment-debtor was brought to sale on several occasions, but the sale could not take place for one reason or other. Pending the above proceedings, the judgment-debtor got himself adjudged an insolvent in I.P. No. 8 of 1968 on the file of the Subordinate Judge of Vellore, obviously under section 10 of the Act. The result was all his properties, including the house property which was sought to be sold in execution of the decree in C.S. No. 14 of 1947, came to vest in the Official Receiver, Vellore, the third respondent herein. The consequence was the execution proceedings in C.S. No 14 of 1947 could not be further prosecuted. In the course of administration of the estate of the insolvent, the Official Receiver, Vellore, brought the house property situated in Gudiyatham Town, belonging to the insolvent to sale in public auction by virtue of the provisions under section 59 of the Act. Several times the property was brought to sale, but the sale could not take place for some reason or other. Ultimately, the sale took place on 14th March, 1973 for a price of Rs. 26,000 to and in favour of the petitioner in this revision. The first respondent in the revision is a shareholder of Sivanandam Palayakot Company, Gudiyatham, the decree-holder in C.S. No. 14 of 1947. He filed an application under section 68 of the Act to set aside the auction sale held by the Official Receiver on 14th March, 1973, urging several grounds. The auction-purchaser, *viz.*, the petitioner herein, mainly contested the application. The application, I.A. No. 39 of 1973 in I.P. No. 8 of 1968 was enquired into by the Additional Subordinate Judge, Vellore, and by judgment and decree dated 10th January, 1974, he dismissed the application negativing the pleas of the first respondent herein. There was an appeal by the first respondent, C.M.A. No. 50 of 1974 which was heard and disposed of by the District Judge of North Arcot at Vellore by his judgment and decree dated 6th January, 1975. The appellate Court chose to reverse the findings of the first Court and held that the sale held by the Official Receiver, the third respondent herein on 14th March, 1973 is affected by serious illegalities, irregularities and infirmities and in that view, the appellate Court set aside the sale concerned and allowed the application, I.A. No. 39 of 1973 referred to above. The auction-purchaser has now preferred this revision challenging the judgment and decree of the appellate Court.

3. Two contentions were urged before me by Mr. M.N. Padmanabhan, learned counsel appearing for the petitioner in this revision. The first contention is that the first respondent herein, the applicant in I.A. No. 39 of 1973 in I.P. No. 8 of 1968 on the file of the Subordinate Judge, Vellore, cannot be characterised as a "person aggrieved" within the meaning of section 68 of the Act. The learned counsel points out that the first respondent is a shareholder and director of a company which is under voluntary liquidation and all or whatever grievances the said Company may have as a creditor of the insolvent, could be ventilated only by and through the liquidator appointed for the Company and the fisrt respondent can never come within the definition of a "person aggrieved" under section 68 of the Act.

4. It would be relevant to extract section 68 of the Act.

"68. *Appeal to Court against receiver.*—If the insolvent or any of the creditors or any other person is aggrieved by any act or

decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just:

"Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of."

There is no dispute that the Company, Sivanandam Palayakot Company, Gudiyatham, is a creditor of the insolvent and the Company has large amounts to be realised out of the estate of the insolvent now in the hands of the Official Receiver, Vellore the third respondent herein. It cannot be stated that the first respondent herein is not interested in the amounts to be realised by the creditor Company out of the estate of the insolvent. By realising the maximum benefit out of the estate of the insolvent in administration of the same by the Official Receiver, the first respondent stands to gain in his own interest. If the property of the insolvent fetches fair and proper price, it will be available in the hands of the Official Receiver for the purpose of satisfying the creditors of the insolvent and the Company in which the first respondent is a shareholder is one such creditor. If the above features are considered, it cannot be ruled out that the first respondent is not a "person aggrieved" within the meaning of section 68 of the Act, if other grounds for interference by the Court under the said section are made out.

5. Mr. P. Sivaramakrishniah, learned counsel appearing for the respondents, drew my attention to the dictums laid down by some of the judicial precedents in this behalf. In *Sayyad Khasim Sahib* v. *The Official Receiver, Guntur*[1] Yahya Ali, J. recognised that it is not merely the insolvent, or the creditors, or any other aggrieved person, who can take action to bring the conduct of a Receiver in any particular respect to the notice of the Court, but the Receiver being an officer of the Court, when it comes to the knowledge of the Court that his action in any particular respect is objectionable, the Court has inherent powers to rectify his errors or mistakes or to reverse or modify his acts or decisions. The learned Judge further held, relying on *Hanseswar Ghosh* v. *Rakhal Das Ghose*[2] that when a Receiver had been appointed, he becomes an officer of the Court and if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the Court, which has inherent power to review the conduct of the Receiver, so that the stranger may not be prejudiced by an unlawful act of its own officer.

1. (1945) 2 M.L.J. 553: 58 L.W. 641: A.I.R. 1946 Mad. 89.

2. (1913) 20 I.C. 683 (2).

6. In *Venkata Krishna Ayyar* v. *Official Receiver*[1] it has been recognised, that an insolvency Court has inherent powers vested in it outside the provisions of section 68 of the Act to rectify the defects, mistakes or errors committed by the Official Receiver; it cannot be said that the Court is powerless to prevent an injury being done to the general body of creditors and the insolvent in consequence of a mistake committed by the Official Receiver in the conduct of an auction sale held by him, merely because the person who applies to the Court to have the mistake rectified is the Receiver himself and not a creditor or insolvent.

7. Mr. M.N. Padmanabhan, learned counsel appearing for the petitioner wants to derive support for his case from the ratio of certain decisions. He brings to my notice a decision of a Bench of this Court reported in *Ramaswami Reddiar* v. *Official Receiver of South Arcot.*[2] There, the question in issue in the present case did not come up for consideration at all.

8. In *Kasi Chettiar* v. *Secretary of State*[3] Abdur Rahman, J., was concerned with a case where the suit by the Official Receiver to set aside a sale of the insolvent's property was dismissed; the Official Receiver refused to prefer appeal and a creditor wanted to prefer an appeal against the dismissal. The learned Judge held that the creditor was not entitled to prefer an appeal on the principle that a right of appeal is not a mere right of procedure and it is a substantive right and is primarily a creature of statute.

9. In *Vaidyanatha Ayyar* v. *The Indian Bank Ltd.*[4] a Division Bench of this Court was concerned with a case of sale of immovable property

1. (1950) 1 M.L.J. 15: (1950) L.W. 47 (2): A.I.R. 1950 Mad 311.

2. (1941) 2 M.L.J. 382: 54 L.W. 215: A.I.R. 1942. Mad. 827.

3. (1941) 53 L.W. 479: (1941) 1 M.L.J. 531: A.I.R. 1941 Mad. 577.

4. (1955) 2 M.L.J. 99: 68 L.W. 330: A.I.R. 1955 Mad. 486.

belonging to a limited company, in execution of a decree and the filing of an application to set aside the sale by a shareholder of the company under Order 21, rule 90 of the Code of Civil Procedure. The Bench observed as follows: (at page 102)

> "A shareholder is no doubt interested in the property of the company in which he holds shares; if the property is not properly looked after and administered, the share-holder would naturally suffer in his pocket. But this does not mean that every shareholder, who apprehends that the property of the company is being mismanaged or is even fraudulently disposed of, is entitled to come in the manner the petitioner has done. It is easy to see that if such a course were permitted, the business of the company can be brought to a complete standstill when differences of opinion exists among the members of the company. One legal effect of incorporation is to vest the ownership of the property in the company, which acquired a separate legal existence. The property has to be managed by the directors, subject to the control of the shareholders and the provisions of the constitution of the company. If the directors misbehave, they can be removed. If they are able to get the backing of the majority and threaten to sue the majority to oppress the minority, that will be an occasion when the Court will interfere. The petitioner alleges that the managing director has perferpetrated a fraud on the company in collusion with Chellappa Chettiar. In respect of such a conduct, the petitioner has a specific remedy provided under section 153-C of the Indian Companies Act."

10. In *Kuttalingam* v. *Chinnakannu*[1], Ramaswami Gounder, J., was concerned with a case where in a winding up proceedings the District Judge allowed 6 per cent. per annum interest to the shareholder who had overdrawn the company money and the learned Judge held that it is only the Official Receiver who is competent to file an appeal and an appeal by another shareholder is not competent.

11. In *Shyamalal* v. *Jagannath*,[2] a Bench of the Calcutta High Court was concerned with the question as to whether a shareholder in process of compulsory winding up of a company has *locus standi* to apply for setting aside a sale of property belonging to the company. The Bench was concerned with the expression "whose interests are affected by the sale" occurring in Order 21, rule 90 of the Code of Civil Procedure and in the context of the case before them, observed as follows: (page 430):

> "The words 'or whose interests are affected by the sale', in Order 21, rule 90 are no longer confined to an interest in immoveable property or to proprietary or possessory rights. The word 'interest' must be given a wide meaning, and may include a contingent interest, but the right may be exercised by one who is directly and immediately affected by the sale of an immoveable property. Rights which are likely to be affected or interest which may hypothetically or remotely be affected cannot be considered as coming within the four corners of Order 21 rule 90."

12. Ramanujam, J., in *Belli Gowder* v. *Govindan*[1] had occasion to deal with the case of a lessee of the insolvent's property who wanted to resort to section 68 of the Act and in those circumstances, the learned Judge laid down the proposition as follows:

> "In this case, no creditor has come forward to challenge the sale conducted by the Official Receiver. It is not possible to say that any lessee of the property of the insolvent will be a person aggrieved within the meaning of section 68 of the Provincial Insolvency Act. On a close reading of section 68 of the Provincial Insolvency Act, it is seen that 'any other person' cannot be construed to include any person unconnected with the insolvent's property or its administration. The words 'any other person' has to be understood in the light of the words following them, that is, 'is aggrieved'. Even if the learned counsel's contention is accepted that a lessee will come within the scope of 'any other person in section 68, it should be further shown that he is aggrieved by the order sought to be challenged by him. As already stated except to protect his position, he is not interested in the insolvent's property or the administration thereof".

13. I do not think that the decisions relied on by the learned counsel for the petitioner could be considered as negativing the case of a shareholder of a creditor company which is

1. (1957) 2 M.L.J 506: 70 L.W. 910: 28 Comp. Cas. 163: A.I.R. 1953 Mad. 260.
2. A.I.R. 1969 Cal. 424.

1. (1970) 2 M L.J. 303 at 304.

under liquidation to seek the process under section 68 of the Act as a "person aggrieved", Hence, in my view, the first respondent will come within the ambit of a "person aggrieved" under section 68 of the Act.

14. It was then submitted by the learned counsel for the petitioner that no tenable grounds for interference under section 68 of the Act have been made out. In *Srinivasa Naicker* v *Engammal*[1], the power of Court under section 68 of the Act to set aside a sale by a Receiver and the grounds on which the sale can be set aside have been explained. It will be pertinent to extract the relevant passage occurring in the decision:

> "It may be accepted that the power of the Court under section 68 is not hedged in by those considerations which apply in cases of auction sales in execution proceedings. Even so, the power under section 68 is a judicial power and must be exercised on well-recognised principles, justifying interference with an act of the receiver which he is empowered to do under section 59 (*a*) of the Act. The fact that the act of the receiver in selling properties under section 59 (*a*) is subject to the control of the Court under section 68 does not mean that the Court can arbitrarily set aside a sale decided upon by the Official Receiver. It is true that the Court has to look in insolvency proceedings to the interest in the first place of the general body of creditors; in the second place to the interest of the insolvent, and lastly, where a sale has been decided upon by the Official receiver to the interest of the intending purchaser in that order. Even so, the decision of the Official receiver in favour of a sale should not be set aside unless there are good grounds for interfering with the discretion exercised by the official receiver. These grounds may be wider than the grounds envisaged in auction sales in execution proceedings. Even so, there must be judicial grounds on which the Court will act in setting aside the sale decided upon by the official receiver. These grounds may be, for example, that there was fraud or collusion between the receiver and the insolvent or the intending purchaser; the Court may also interfere if it is of opinion that there were irregularities in the conduct of the sale which might have affected the price fetched at the sale; again, even though there may be no collusion, fraud or irregularity, the price fetched may still be so low as to justify the Court to hold that the property should not be sold at that price. These grounds or similar other grounds depending upon particular circumstances of each case may justify a Court in interfering with the act of the official receiver in the case of a sale by him under section 59 (*a*) of the Act."

15. The dictum of the Supreme Court has been followed by Maharajan, J., in *Narayanan* v. *Kannabiran Mudaliar*[1]. Keeping the above principles in mind if the facts of the present case are considered, I find that the appellate Court, on a proper appraisal of the factual materials, came to the conclusion that there had been no due proclamation of sale for the auction held on 14th March, 1973; that the petitioner herein has entered into some colourable arrangement or agreement with a view to knock away the property for a low price and accordingly purchased, the same for Rs. 26,000 though the property, in fact, is worth much more than that. The appellate Court relied on the evidence adduced, on behalf of the first respondent herein and other materials on record to come to the conclusion that there was no due proclamation of sale of the property in question. The appellate Court has also taken into consideration the fact that the petitioner herein is the tenant of the property concerned for the past several years and the property would definitely fetch a higher price if the sale had been properly advertised and due publicity given thereof. These considerations are purely factual and as laid down in *Malini Naicker* v. *Seth Mangharaj*[2], the Court ought not to interfere under section 75 (1) of the Act merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived. The powers of revision of this Court under section 75 (1) of the Act are narrow and interference is possible by this Court only on a question of law. The findings of fact rendered by the Tribunals created under the Act are findings which are final as provided for in section 75 (1) itself. The above is the view expressed by Ramaprasada Rao, J., in *Distric Official Receiver* v. *Lakshmi Ammal.*[3] The same

1. A.I.R. 1962 S.C. 1141 at 1143.

1. (1974) 2 M.L.J. 303.

2. (1969) 2 S.C.J. 831: (1970) 1 M.L.J. (S.C.) 1: (1970) 1 An. W.R. (S.C.) 1: (1969) 3 S.C.R. 898: A.I.R. 1969 S.C. 1344.

3. (1974) 2 M.L.J. 397.

principle has been followed by me in *M.S. Narayana Iyer* v. *A.G.A. Funds*[1]. In view of the above, it is not possible for this Court to come to a conclusion different from that arrived at by the appellate Court on the factual questions involved. The judgment and decree of the appellate Court cannot be characterised as "not according to law" so as to warrant interference in revision. Hence this revision is dismissed. But, there will be no order as to costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram J.*

K. Krishnan .. *Petitioner**

v.

S. Ayyathurai and others .. *Respondents*

Provincial Insolvency Act (V of 1920), *sections* 10, 11 *and* 13 (1)—*Scope and applicability—Debtor seeking adjudication on ground of inability to pay —Court's duty.*

Held: In the present case the petitioner has placed all the materials before the Court below which do *prima facie* satisfy the Court that he is unable to pay his debts. The orders of the Courts below are vitiated in the sense that they have tested the *bona fides* of the petitioner from more than one angle and they have indulged in a deep enquiry, which is unwarranted for the purpose of finding out *prima facie* about the inability of the debtor to pay his debts.

There is no necessity to insist that to come within the purview of section 11 the debtor must permanently reside or permanently carry on business, or permanently work for gain in the concerned area. [*Para.* 3.]

Cases referred to:—

Lingasami Goundar v. *Subramanian,* (1974) 2 M.L.J. 166; *Mohammed Zackeria* v. *Srinivasan and Company,* (1957) 70 L.W. 367: A.I.R. 1957 Mad. 403; *Lakshminarayana Aiyar* v. *Subramania Aiyar,* 45 M.L.W. 129; *Kishan* v. *Raj Bahadur,* A.I.R. 1914 Oudh 313; *Henri Thomas Victor* v. *Mohammed Gul Khan,* A.I.R. 1917 Oudh 176.

1. C.R.P. No. 107 of 1975.

* C.R.P. No. 558 of 1975. *6th February,* 1978.

Petition under section 75 (1) of the Provincial Insolvency Act, 1920 praying the High Court to revise the Order of the Additional District Court, Madurai dated 10th January, 1975, and made in C.M.A. No. 42/74 (I.P. 1/73 District Munsif, Thirumangalam),

E. Padmanabhan, for Petitioner.

N. Thiagarajan, for *P. Anantakrishnan Nair*, for 1st and 3rd Respondents.

The Court made the following.

ORDER.—The petitioner/debtor in I.P. No. 1/73 on the file of the District Munsif o Thirumangalam, is the revision petitioner. The respondents herein were arrayed as creditors in the said insolvency petition. The petitioner filed the petition under sections 10 and 13 (1) of the Provincial Insolvency Act (hereinafter referred to as the Act) for adjudging himself as an insolvent. The material averments made in the petition are that the petitioner is a resident of Thirumangalam; that he suffered heavy loss in the coir business which he carried on with his brother: that he has got an one-fourth share in the property shown in Schedule B to the petition; that he is earning only Rs. 150 per month; that he is unable to pay his debts and that he should be adjudged an insolvent in the said circumstances. Respondents 1 and 3 contested the petition mainly on two grounds, (1) that the District Munsif, Thirumangalam has no jurisdiction to entertain the insolvency petition because the petitioner is residing at Nagercoil and the property described in the petition is also situate in Nagercoil; (2) that the petitioner cannot be said to be a person unable to pay his debts. The District Munsif, Thirumangalam, dismissed the petition and aggrieved by the same, the petitioner preferred C.M.A. No. 42 of 1974, which came to be heard and disposed of by the Additional District Judge of Madurai. The appellate Court concurred with the findings of the first Court and dismissed the appeal. The present revision is directed against the orders of the appellate Court.

2. The questions that come up for consideration in this revision, and as urged by the learned counsel for the petitioner, would be (1)

whether the Courts below have conformed to the principles laid down under the Act for consideration of a debtor's petition for self-adjudication on the ground that he is unable to pay his debts; and (2) Whether the debtor has not satisfied the provisions of section 11 of the Act with reference to the prosecution of the petition before the District Munsif of Thirumangalam. The law with regard to the consideration of a petition by a debtor under section 10 (1) of the Act is well settled by decisions of this Court. The proviso to section 24 (1) (*a*) of the Act reads as follows:

> "Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon.

Ramaprasada Rao, J. defined the scope of enquiry under section 24 o the Act in *Lingasami Goundar* v. *Subramanian*,[1] in the following terms:

> "When the statute uses the word *prima facie* grounds for believing the statement of the debtor of his inability to pay his debts, the degree of the burden of proof that is called for by the statute is not to be equated to the degree of proof as is always necessary in an ordinary civil litigation. In my view such a detailed examination is not warranted. If a person approaches the Court by inflicting on himself the ignominy of his inability to pay his debts and in consequence seeks for an order adjudicating him insolvent, then, unless there is strong evidence to disprove such a voluntary confession made by him, the Court need not at that stage employ itself in a deep enquiry regarding the opulence of the debtor and his ability to pay his debts. A summary enquiry is indicated; *prima facie* proof is called for and if that is undertaken and if a decision is rendered by the appropriate Court, then it cannot be said that such an order is without jurisdiction or suffers from any material irregularity. The High Court also, under section 75 (1) of the Act is only expected to see whether the order of the appellate Court is in accordance with law or not. The lower Court says that *prima facie* it is satisfied that the respondent is unable to pay his debts. This is a finding based on application of material considered by the Court below. The order otherwise cannot be said to be not in accordance with law."

3. This dictum has been adopted by me while dealing with a similar cese in C.R.P. No. 107 of 1975. Keeping this principle in mind, if one scrutinises the orders of the Courts below, it is patent that they have violated the said principle literally and practically. The District Munsif, Thirumangalam, observes as follows:—

> "In cross-examination, the petitioner has stated that he does not know the material particulars of his own property. He even goes to the extent of saying that he does not know the boundaries and measurements of the property of his own. The 3rd respondent did not enter into the box and it is not clear as to whether the 3rd respondent is the close friend of the petitioner. Admittedly, the property mentioned in the petition is situate in Nagercoil Municipal Town. There is no evidence to show that the other pronotes were executed for the purpose of dischargiag family debts. The 1st respondent would depose that the petition mentioned property's value is more than Rs. 10,000. Respondent No. 2 remained *ex parte*. The 3rd respondent has not entered the box. Under these circumstances, I see no reason to allow this petition. I hold that the petitioner is liable to pay the debts of the 1st respondent."

Equally so, the appellate Court has launched upon a deep enquiry as to the *bona fides* of the claims of the debtor. This is evident from the discussion of the case by the appellate Court in paragraph 4 of its judgment, the relevant portion of which is extracted hereunder-

> "But even according to him he owns a property described in B Schedule lying within the Nagercoil municipal limits. He has valued it at Rs. 10,000. 3rd respondent also claims to have obtained a decree against the appellant in O.S. No. 715/71 on the file of the District Munsif's Court, Nagercoil. It is stated that even the *B* Schedule property is worth more than Rs. 10,000. Significantly the counters filed by respondents 1 and 3 did not provoke appellant to file any rejoinder to refute their

1. (1974) 2 M.L.J. 166.

claims. On the other hand, appellant alone has been examined as P.W.1. P.W.1. says that he incurred the debts in the course of the business. No details of his business are mentioned. It is not as though he was having an independent business. The business was that of his brother also. His brother has not been impleaded as a party to the proceedings. Not a scrap of paper has been placed to show that the business has ended in loss. The contention of 3rd respondent is that even now in the business appellant gets more than Rs. 1,000 per month. Decrees had been obtained by respondents 1 and 3 only individually against the appellant. There is no question of any joint decree against the appellant's brother. The petitioner says that he is now getting Rs. 150 per month. As P W.1. he says that he is working in a firm at Rs. 150 per month. That firm has not been summoned. Apart from P.W.1 none else has been examined to show that he is employed in that firm or that he is paid Rs. 150 per month alone. Taking all these materials it is difficult for me to come to the conclusion that even in a *prima facie* manner the appellant is unable to pay his debts."

This approach has been discountenanced by this Court, as stated above. Hence I find that the petitioner has placed materials before the Courts below which do *prima facie* satisfy the Court that he is unable to pay his debts and the orders of the Courts below are vitiated in the sense that they have tested the *bona fides* of the petitioner from more than one angle and they have indulged in a deep enquiry, which is unwarranted for the purpose of finding out *prima facie* about the inability of the debtor to pay his debts.

4. Coming to the next point regarding jurisdiction, I find that the District Munsif, Thirumangalam has not mooted out a point for consideration on the question of jurisdiction. On the other hand, the appellate Court did formulate the point with regard to jurisdiction, but on an assumption that before the petition could be presented in the Court of the District Munsif of Thirumangalam, the petitioner must be a permanent resident within the jurisdiction of that Court, or must permanently carry on business or permanently work for gain in such local area. From a reading of section 11 of the Act, I do not find any warrant for substituting or adding the word 'permanently' for or to the expressions specifically used in that section. Section 11 of the Act reads as follows:—

"Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody;

Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity and unless there has been a consequent failure of justice".

There is no necessity to insist that to come within the purview of section 11, the debtor must permanently reside, or permanently carry on business, or permanently work for gain in the concerned local area. Such a view runs contra to the decision of a Bench of this Court in *Mohamed Zackeria* v. *V. Srinivasan and Co.*,[1] dealing with a case arising under the Presidency Towns Insolvency Act, containing similar provisions. In *Lakshminarayana Aiyar* v. *Subramania Aiyar*,[2] it was laid down as follows:—

"It is enough if the debtor has remained within the limits of the District in which he presented the petition, though he may not have any permanent or continuous residence within it and may have occasionally gone outside the District and returned to it."

Similar views have been taken in *Kishan* v. *Raj Bahadur*[3] and in *Henri Thomas Victor* v. *Muhammad Gul Khan*[4] while considering similar provisions. under the Provincial Insolvency Act of 1907 It is evident from Exhibits A. 1 to A. 3 that at the relevant point of time the petitioner remained and carried on business in coir mats within the jurisdiction of the District Munsif, Thirumangalam. That would satisfy the requirements and the petition filed by him for self-adjudication before the District Munsif, Thirumangalam is competent.

5. In the said circumstances, this revision is allowed, but there will be no order as to costs.

R.S. ——— *Petition allowed.*

1. (1957) 70 L.W. 367: A.I.R. 1957 Mad. 403.
2. (1923) 45 M.L.J. 129: A.I.R. 1923 Mad. 585.
3. A.I R. 1914 Oudh 313.
4. A I.R. 1917 Oudh 176.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.* and *G. Ramanujam, J.*

The Executive Engineer, Construction, Southern Railway, Erode and others .. *Petitioners**

v.

K. V. Verghese and others .. *Respondents.*

Indian Railways Act (IX of 1890), sections 3 (5), 3 (6)—Payment of Gratuity Act (XXXIX of 1972), sections 2 (p) and 4—Railway Company different from railway administration—Railway administration may include railway company but not a railway administered by Central Government—Southern railway not a railway company for purposes of payment of gratuity.

The definition of a railway company in section 3 (5) of the Railways Act denotes the owners or lessees of railway or parties to an agreement for working a railway. The railway administration in the case of a railway administered by the Government means under section 3 (6) the manager of the railway or the Central Government and in the case of a railway, administered by a railway company, the railway company itself. Section 2 (*p*) of the Payment of Gratuity Act takes in only the definition contained in section 3 (5) and not the definition of railway administration contained in section 3 (6) of the Railways Act. Railway administration and railway company have been separately defined under the Indian Railways Act, and the Payment of Gratuity Act is made applicable only to a railway company. Having regard to the said separate definitions, railway company should be taken to have been treated differently from a railway administration owned or administered by the Central Government, in the Indian Railways Act. [*Paras.* 6 *and* 8.]

A close reading of sections 3 (5) and 3 (6) of the Railways Act would indicate that while the definition of railway administration will take in a railway company the definition of railway company will not take in a railway administered by Central Government. [*Para.* 8]

The definition of the 'railway company' has necessarily to be understood in the light of the definition of railway administration contained in section 3 (6) of the (Railways) Act. Therefore, the definition of railway company occurring in section 3 (5) of the Indian Railways Act cannot be construed as including all railways either owned or administered by the Central Government, or owned by others. That definition will have to be understood only as referring to the railways administered by persons other than the Central Government. In this view, it cannot be accepted that the Southern Railway owned and administered by the Central Government has to be treated as a railway company for the purpose of payment of gratuity. [*Para.* 8.]

Cases referred to:—

Chandra Mohan v. *Union of India*, A.I.R. 1953 Assam 193; *Kerala State* v. *G.M.S. Railway, Madras*, A.I.R. 1965 Ker. 277; *Jetmull Bhojraj* v. *D.H. Railway*, (1963) 1 S.C.J. 505: (1963) 2 S.C.R. 832: (1963) 1 An. W.R. (S.C.) 89: (1963) 1 M.L.J. (S.C.) 89: A.I.R. 1962 S.C. 1879; *Mohammed Kutty* v. *H. C. of Kerala*, (1978) 1 L.L.J. 333.

Petitions under Article 226 of the Constitution praying the High Court to issue writs of *certiorari* calling for records relating to case No. 10 of 1975 etc., and quash the same.

K. Venkateswara Rao, for Petitioner.

V. Shyamalam, A. Ramachandran, for *Row* and *Reddy* and *K. Swamidurai*, Additional Central Government Standing Counsel, for Respondents.

The Order of the Court was made by

Ramanujam, J.—The first respondent herein was employed by the Southern Railway Administration under the Executive Engineer, (Construction), Erode, as a casual labourer from 16th September, 1961. He was retrenched from service on 20th July, 1974. At the time of retrenchment he was working as a lorry driver. On the ground that he had worked for more than 5 years continuously and was drawing a daily rate of Rs. 10.40 at the time of his retrenchment, he made an application claiming a sum of Rs. 2,028 as gratuity under the Payment of Gratuity Act, 1972 (hereinafter referred to as 'the Act'). The second respondent who is the Controlling Authority under the Act dismissed the application holding that the first respondent was not eligible for any gratuity under the said Act as the said Act is

*W. P. Nos. 1638, 1639, 4498 and 4509 of 1976.
20th September, 1978.

not applicable to persons working under the railway administration and that in any event the first respondent who has been paid retrenchment compensation under the Industrial Disputes Act cannot claim gratuity.

2. Aggrieved against the order of the Controlling Authority the first respondent preferred an appeal to the third respondent contending that the railway administration will come under the definition of 'Railway Company' as defined under the Act and that therefore, he is eligible for gratuity under the Act. He also contended that even retrenched employees who have received the retrenchment compensation under the Industrial Disputes Act are entitled to the payment of gratuity under section 4 of the Act. On the other hand the contention of the railway administration before the third respondent was that the railway administration owned and operated by the Union of India cannot be construed as a 'Railway Company' for the purpose of the Act and that in any event the first respondent who was only a casual employee having been retrenched on payment of retrenchment compensation, such retrenchment will not amount to a termination of employment as contemplated by section 4 of the Act. The appellate authority accepted the contention of the first respondent on both the points, and held that section 3 (4) and section 3 (5) of the Indian Railways Act indicate that the State-owned Railway Administration is also a Railway Company, that retrenchment under the Industrial Disputes Act will amount to termination of employment as contemplated by section 4 of the Act and that therefore, the first respondent is eligible for payment of gratuity under the Act.

3. Aggrieved against the said order of the Appellate Authority, the railway administration has filed this writ petition. It is contended by the Railway Administration that the impugned order passed by the Appellate Authority is clearly erroneous in that the railway administration cannot be brought within the definition of a railway company which alone comes under the Payment of Gratuity Act, and that the retrenchm.nt of an employee will not amount to termination of employment so as to attract section 4 of the Act.

4. Thus, the two questions that arise for consideration in this writ petition are these:—

1. Whether the railway administration can be considered as a Railway Company as defined in section 3 (5) of the Indian Railways Act for the purpose of payment of gratuity; (2) Whether a retrenched employee is eligible for payment of gratuity under section 4 of the Act.

5. With regard to the first contention, it has been urged by the Railway Administration that the railway company having been defined in section 2 (*p*) of the Act, unless the Railway Administration comes within the definition of Railway Company, it cannot be taken to be covered by the Payment of Gratuity Act, as that Act applies only to a railway company and not to the Railway Administration. To appreciate this contention it is necessary to scan through the provisions of the Act.

Section 1 (3) makes the Act applicable to every factory, mine, oilfield, plantation, port and railway company; every shop or an establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State in which ten or more persons are employed and such other establishments or class of establishments, as the Central Government may, by notification specify.

Section 2 (*a*) defines 'appropriate Government' as meaning in relation to an establishment of a major port, mine, oilfield or railway company, the Central Government.

Section 2 (*e*) defines an employee as a person employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work.

Section 2 (*f*) of the Act defines 'employer' as meaning in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop (*i*) belonging to, or under the control of the Central Government or a State Government, a person or authority appointed by the appropriate Government or where no person or authority has been so appointed, the head of the Ministry or the depatment concerned;

(*ii*) belonging to, or under the control of any local authority person appointed by such authority for the supervision and control of employees or where no person has been so appointed, the chief executive officer of the local authority;

(*iii*) in any other case, the person, who, or the authority which, has the ultimate control over

the affairs of the establishment, factory, mine oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted, to any other person, whether called a Manager, Managing Director or by any other name.

Section 2 (*p*) of the Act defines railway company and it says that railway company will have the same meaning as in clause (5) of section 3 of the Indian Railways Act, 1890.

Section 4 of the Act provides for payment of gratuity to an employee on the termination of his employment after he has rendered continuous service for not less than five years— (*a*) on his superannuation, or (*b*) on his retirement or resignation, or (*c*) on his death or disablement due to accident or disease.

6. It is in the light of these provisions the tenability of the first contention urged by the writ petitioner has to be considered. It is the case of the petitioner that the railway administration having been separately defined in section 3 (6) of the Indian Railways Act, it cannot be brought in within the definition of 'railway company', in section 3 (5) of the same Act. The definition of Railway Company in section 2 (*p*) of the payment of Gratuity Act takes in only the definition contained in section 3 (5) and not the definition of Railway Administration contained-in section 3 (6) of the Indian Railways Act. The Railway Company as defined in section 3 (5) of the Indian Railways Act is as follows—

> 'Railway company' includes any persons, whether incorporated or not, who are owners or lessees of a railway or parties to an agreement for working a railway."

Railway Administration has been separately defined in S. 3 (6) as follows.—

> 'Railway Administration' or 'administration' in the case of a railway administered by the Government means the manager of the railway and includes the Government, and, in the case of a railway administered by a Railway Company, means the Railway Company".

As per the definition the Railway Company denotes the owners or lessees of railway or parties to an agreement for working a railway. The Railway Administration in the case of a railway administered by the Government, means the manager of the railway or the Central Government and in the case of a railway, administered by a Railway Company, the Railway Company itself.

7. It is contended by the first respondent-employee that the Central Government being the owner of the Southern Railway will come under the definition of a railway company and the definition of the railway company will therefore take in the railway administration as well. In this case, the question is how far the said submission of the employee could be accepted.

8. Railway administration and railway company have been separately defined under the Indian Railways Act, and the Payment of Gratuity Act is made applicable only to a railway company. Having regard to the said separate definitions, railway company should be taken to have been treated differently from a railway administration owned or administered by the Central Government, in the Indian Railways Act. It is true that the definition of railway administration will take in a railway company in the case of a railway administered by that company. The provisions in the Indian Railways Act also make a clear-cut distinction between a railway company and a railway administered by the Central Government, though the administrative machiney of both the railways is generally termed as railway administration. A close reading of sections 3 (5) and 3 (6) of the Railways Act would indicate that while the definition of railway administration will take in a railway company the definition of railway company will not take in a railway administered by Central Government. Section 47 of the Indian Railways Act creates two separate rule making authorities in respect of a railway administered by the Central Government and a railway administered by a railway company. Section 49 contemplates a railway company entering into agreement with Central Government for the construction of rolling-stock, plant or machinery used by the railways or for leasing or taking on lease any rolling stock, plant, machinery or eqnipmeuts required. Section 50 of the Act contemplates a railway company entering into agreement with the sanction of the Central Government with any other railway administration. Section 51 contemplates a railway company carrying on certain activites with the sanction of the Central Government. Section 51 (*a*) permits a railway company to frame schemes for providing motor transport or aircraft service for passengers, animals, goods, etc., with the sanction of the Central Government. Section 51 (1) (*a*) (5) enables Central Government to withdraw the sanction given to a railway company under sub-section (1) after giving six month's notice,

section 140 provides for service of notices, in the case of a railway administered by the Government, on its Manager or Chief Commercial Superintendent, and in the case of a railway administered by a railway company on its Agent in India. Section 145 also makes a distinction between a railway administered by the Central Government and a railway administered by a railway company. Having regard to these provisions it is clear that a railway administered by the Central Government is treated differently from a railway administered by a railway company. Though the definition of the 'railway administration' contained in section 3 (6) of the Indian Railways Act, will take in a railway company when used in relation to the administration of that railway company, railway owned and administered by the Central Government cannot be taken to be covered by the definition of a 'railway company'. In the face of the definition of railway administration which refers to two categories of administration, one a railway owned and administered by the Central Government and the other administered by the railway company the definition of railway company cannot in any sense be taken to include a railway administered by the Central Government. In this case, the first respondent has claimed gratuity against the Southern Railway which is administered by the Central Government, and not administered by a railway company. Learned counsel for the employee-first respondent would say that the Central Government owning the Southern Railway will also come under the definition of a railway company which according to him includes all persons owning railways. Perhaps, if there is no separate definition of railway administration, there may be scope for such an argument. But, when the definition of 'railway administration' contemplates two railways, one administered by the Central Government and the other administered by the railway company, it cannot be said that railway company includes a railway administered by the Central Government. The definition of the 'railway company' has necessarily to be understood in the light of the definition of railway administration contained in section 3 (5) of the Act. Therefore, we are not in position to construe the definition of 'railway company' occurring in section 3 (5) of the Indian Railways Act as including all railways either owned or administered by the Central Government, or owned by others. That definition will have to be understood only as referring to the railways administered by persons other than the Central Government. In this view, we cannot accept the view taken by the third respondent that the Southern Railway owned and administered by the Central Government has to be treated as a railway company for the purpose of payment of gratuity.

9. Learned counsel for the first respondent would also submit that even if the Southern Railway does not fall within the definition of 'railway company' as defined in section 3 (5) of the Indian Railwas Act, it will come under the definition of an 'establishment' or a 'factory' belonging to or under the control of the Central Government, and such being the case, the Southern Railway will come under the definition of an employer under the Act. The question then is whether the Southern Railway will come under the definition of an 'establishment or' a 'factory'.

10. Section 1 (3) of the Payment of Gratuity Act says that the Act applies to every factory, mine, oilfield, plantation, port and railway company and every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments, in a State. Admittedly, the Madras Shops and Establishments Act, 1947, which applies to the entire State of Tamil Nadu will not cover Southern Railway. The definition of 'establishment' in Madras Shops and Establishments Act, 1947, refers only to a shop, commercial establishment, restaurant, eating house, residential hotel, theatre or any place of public amusement or entertainment and includes any such establishment as may be notified by the State Government. 'Commercial establishment' means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking. The Southern Railway does not obviously fall within the definition of an establishment under the Act. It is not in dispute that the railway administration has not been notified as an establishment under section 1 (3) (*c*) of the Act. Therefore, the Southern Railway can be brought within the Payment of Gratuity Act only if it comes within the definition of a factory. In this case, the first respondent has not come forward with a case that the Southern Railway is a factory, as defined in sub-section (*m*) of section 2 of the Factories Act, 1948. It is not therefore, possible to go into the question as to whether the first respondent works in a factory and can

claim gratuity on that basis. That has to be considered by the authorities under the Payment of Gratuity Act as and when such a claim is put forward.

11. Learned counsel for the petitioner then submits that having regard to the objects of the Payment of Gratuity Act which is to confer benefit on all the employees, the employees working under the railways administered by the Central Govenment cannot be taken to be excluded from the purview of the Act. It is true that the Act is a beneficial measure. Even then its applicability has to be considered with reference to the provisions of the Act and not with any assumed intention of the Legislature. The employees of the railways administered by the Central Government are entitled to get gratuity under the Service Rules applicable to them, and perhaps for that reason the provisions of the Gratuity Act have not been extended to them. Learned counsel for the petitioner refers to the Rules called the Pensionable Inferior Railway Servants (Gratuity, Pension and Retirement) Rules, under which the gratuity is payable to the railway employees on discharge from the railway on account of reduction of its establishment or on retirement on the ground of permanent incapacity or on superannuation. In this view, we are not considering the tenability of the second contention.

12. In the light of the above discussion, we have to quash the impugned order of the third respondent holding that the first respondent is entitled to the gratuity under the Payment of Gratuity Act. Learned counsel has referred to the following decisions in *Chandra-Mohan* v. *Union of India*[1]; *Kerala State* v. *G.M.S., Railway, Madras*[2]; *Jetmull Bhojraj* v. *D.H. Railway*[3], *and Mohammed Kutty* v. *H.C. of Kerala*[4]. However, on a perusal of the said decisions, we find that these decisions are not of any assistance in determining the scope of the provisions of the Payment of Gratuity Act and their applicability to the railway administered by the Central Government.

1. A.I.R. 1953 Assam 193.
2. A.I.R. 1965 Kerala 277.
3. (1963) 1 S.C.J 505; (1963) 2 S.C.R. 832; (1963) 1 An. W.R. (S.C.) 89; (1963) 1 M.L.J. (S.C.) 89; A.I.R. 1962 S.C. 1879.
4. (1978) 1 L.L.J. 333.

13. The writ petition is therefore allowed, and *rule nisi* is made absolute. But there will be no order as to costs. In view of the decision in W.P. No. 1638 of 1976, the Writ Petitions Nos. 1639, 4498 and 4509 of 1976, are allowed. No costs.

S.J. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

Ameena Bibi *alias* **Sahebzadi and others** .. *Petitioners**

v.

The Assistant Commissioner of Urban Land Tax, Tiruchirappalli North and another .. *Respondents.*

Tamil Nadu Urban Land Tax Act (XXIV of 1963) sections 3 and 5—Mohammedan Law—Death of owner—Inheritance by heirs co instanti *the owner died as tenants-in-common - Actual division by metes and bounds not necessary—Holding not taxable as one unit.*

One Q, the husband of the first petitioner and father of the petitioners 2 to 8, died on 26th July, 1970 leaving behind him 3 grounds and 2154 sq. ft. of urban land. Q was a Mohammedan. After his death the authorities assessed under the Urban Land Tax Act the entire land in the hands of the petitioners. This was objected to on the ground that on the death of Q, each of the petitioners became entitled to one-eighth share in the land and as instantaneous devolution of property had taken place on the death of Q, the authorities could not treat the entire extent of land as one holding. This was not accepted and hence the writ petition.

Held, under the Mohammedan Law, devolution of estate took place on the heirs immediately on the death of the owner of the property. The moment Q died, each of the eight petitioners automatically inherited an one-eighth share in his properties. Such being the case, they had become tenants-in-common and could not, therefore, be deemed as an agent or manager or representative for one another. The fact that actual division by metes and bounds had not taken place was of no consequence whatever. Their share in the property

*W. P. No. 4556 of 1976. 14th August, 1978.

was crystallised and inheritance had taken place *eo instanti* Q died. That being the case, the respondents were clearly in error in holding that without actual division by metes and bounds, all the eight petitioners would fall within the definition of 'owner' contained in the Act. [*Para.* 5.]

Case referred to:—

Lakshmiammal v. *Assistant Commissioner of Urban Land Tax*, (1975) 88 L.W. 1.

Petition under Article 226 of the Constitution praying the High Court to issue a writ of *certiorari* quashing the order of the 2nd respondent in U.L.T.C. M. A. No. 120 of 1975, etc.

Hajee P. K. Jamal Mohamed, for Petitioner.

K. Venkataswami, Additional Government Pleader, for Respondents.

The Court made the following

ORDER:—The petitioners are aggrieved by an order of assessment made against them under the Tamil Nadu Urban Land Tax Act and have, therefore, preferred this writ petition for issue of a writ of *certiorari* and *mandamus* to quash the assessment order and to direct the respondent to assess their liability, if any, under the Act as individual members.

2. One P. Quda Baksh, who is the husband of the first petitioner, and father of petitioners 2 to 8, died on 26th July, 1970, leaving behind him about 3 grounds and 2154 sq. ft. of urban land within the limits of Tiruchirapalli Municipality. After his death, the first respondent has assessed the entire extent of land left by him in the hands of the petitioners and demanded urban land tax from them on the basis of such assessment. This was objected to on the ground that on the death of Quda Baksh, each of the petitioners became entitled to an one-eighth share in the land and as instantaneous devolution of property has taken place on Quda Baksh's death, the first respondent is not entitled to treat the entire extent of land as one holding and levy urban land tax on the same. If the land is divided into eight shares, it will not attract the imposition of urban land tax. This contention was not accepted by the first respondent because, according to him, actual division by metes and bounds should have taken place if the petitioners wanted to have the holding assessed as individual units. The second respondent, which is the Appellate Authority, has sustained the view of the first respondent and hence the persent writ petition.

3. Mr. P.K. Jamal Mohamed, learned counsel for the petitioners states that the view taken by respondents 1 and 2 is clearly opposed to the provisions of the Urban Land Tax Act as well as Mohamedan Law, and, therefore, there is an apparent error of law in the impugned orders. The word 'owner' in the Tamil Nadu Urban Land Tax Act, 1966, is defined thus—

"'Owner' includes—

(*i*) any person (including a mortgagee in possession) for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purposes, the rent or profits of urban land or of the building constructed on the urban land in respect of which the word is used;

(*ii*) any person who is entitled to the kudiwarm in respect of any inam land;

but does not include—

(*a*) a *shrotriamdar*; or

(*b*) any person who is entitled to the melwaram in respect of any inam land but in respect of which land any other person is entitled to the kudiwaram.

Explanation:—For the purposes of clause (9) and clause (10), inam land includes *lakhiroj* tenures of land and *shrotriam* land".

The charging section under the Act is section 5 and it reads as follows:—

"Subject to the other provisions contained in this Act, there shall be levied and collected for every fasli year commencing from the date of commencement of this Act, a tax on each urban land (hereinafter referred to as the urban land tax) from the owner of such urban land (at the rate specified in the schedule.)"

4. A Bench of this Court, to which I was a party, has held in *Lakshmiammal* v. *Assistant Commissioner of Urban Land Tax*[1], that in a taxing statute, the main provisions to be looked

1. (1975) 88 L.W. 1.

into in order to determine the ambit of the burden the tax-payer should bear are the charging section and the provisions providing for allowance. Therefore, it follows that the liability of an owner of urban land to pay tax under the Act has to be determined with reference to the terms of section 5 of the Act. The section imposes an obligation of paying tax on the owner of the urban land. I have already extracted the definition ofthe term 'owner found in the Act. The definition is an inclusive one and includes not only an owner who receives or is entitled to receive the rent or profits of the urban land on his own behalf, but also a mortagee in possession as well as an agent, trustee, guardian, manager or receiver who receives or is entitled to receive the rent or profits on behalf of the owner of the land. In the instant case, we have, therefore, to see whether each of the petitioners can be deemed to be an agent or trustee or manager of one another. For an answer to this question, we must look into the provisions of the Mohamedan Law.

5. Under the Mohamedan Law, devolution of estate takes place on the heirs, immediately on the death of the owner of the property. I need only quote certain passages occurring in Mullah's Principles of Mohamedan Law, 16th Edition, page 31, in this behalf

> "*Devolution of inheritance*—Subject to the provisions of Ss. 39 and 40, the whole estate of a deceased Mohamedan if he has died intestate or so much of it as has not been disposed of by Will, if he has left a Will (section 118), devolves on his heirs *at the moment of his death*, and the devolution is not suspended by reason merely of debts being due from the deceased. The heirs succeed to the estate as tenants-in-common in specific shares."

To the same effect is the following passage occurring in Tyabji's Muslim Law, 4th Edition, page 708:

> "Where a Muslim dies without appointing any executor, and no person obtains Letters of Administration to the deceased's estate the whole of it vests in severalty as from the time of his decease, upon his heirs in proportion to their respective right of inheritance."

From the above excerpts, it is clear that the moment Quda Baksh died, each of the eight petitioners automatically inherited an one-eighth share in his properties. Such being the case, they have become tenants-in-common and cannot, therefore, be deemed as an agent or manager or representative for one another. The fact that actual division by metes and bounds has not taken place is of no consequence whatever. Their share in the property is crystallised and inheritance has taken place *eo instanti* Quda Baksh died. That being the case, the respondents were clearly in error in holding that without actual division by metes and bounds, all the eight petitioners will fall within the definition of 'owner' cantained in the Act.

6. Learned Government Pleader invites my attention to two unreported cases of this Court to sustain the order of the respondent. The first is by a Division Bench of this Court *Abdul Khader Ibrahim* v. *Assistant Commissioner of Urban Land Tax, Madurai*[1]. Apart from the judgment not giving any details of the case, there is no comparison between the facts of the instant case and the case which is cited. That appears to be a case where properties were bequeathed to several persons under a Will and in addition to that a Wakf had also been created and some of the legatees had been constituted trustees. It was in that peculiar and complicated state of affairs, this Court refused to entertain the plea of the assessees that the properties the assessees should be assessed individually in their hands for purposes of urban land tax and the Taxing Authorities should not insist upon a sub-division of the property. Such, however, is not the case here. The other case cited is in *Munawar Hussaian* v. *Asst. Commissioner of Urban Land Tax, Madurai*[2]. That judgment has merely followed the Bench judgment referred to above and does not give any reasons for rejecting the contention of the petitioner therein. Morever, it appears to be a case where boundaries were also in dispute, because the Court has observed that the petitioner can have the properties properly surveyed and demarcated under the Survey and Boundaries Act, 1923. The facts of the present case have therefore nothing in common with the cases referred to above.

7. It is brought to my attention that Ramanujam, J., has held in *Asst. Commissioner of Urban Land Tax* v. *Urban Land Tax Tribunal, Coimbatore*[3], that when an item of urban pro-

1. W.P. No. 852 of 1976.
2. W.Ps. Nos. 1351 and 1437 of 1976.
3. W.P. No. 2853 of 1977.

perty is owned by two individuals, the Assessing Officer is not entitled to tax the holding as one unit in the absence of a division by metes and bounds of the property. I am in respectful agreement with the view taken by the learned Judge in that case. The petitioners' case is much stronger than the one dealt with by Ramanujam, J., because this is a case of inheritance of property by Muslims, and as pointed out already the devolution takes place *eo instanti* the death of the previous owner had taken place.

8. In the light of the discussion contained above, it follows that the impugned order cannot be sustained The writ petition will, therefore, stand allowed with costs and fresh assessment of the property, if necessary will be done in accordance with the direction, given in this judgment. Counsel's fee Rs. 100/-.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Annamalai .. *Appellant**

v.

Abithakujambal and others .. *Respondents.*

Tort—Negligence—Motor accident—Car driven by employee in the course of employment Accident due to negligence of employee — Master held liable vicariously.

One *J* was run over by a Willy's jeep van belonging to the Government of Tamil Nadu. The vehicle was driven by *A*, an officer of the Government of Tamil Nadu. *J's* widow and her two daughters filed a claim petition before the Motor Accident claims Tribunal. The first respondent was the Government of Tamil Nadu, the second respondent the driver, and the third respondent was the officer who was travelling in the vehicle. Sometime before the accident, the second respondent had complained of chest pain and he handed over the vehicle to the third respondent, who had a driving licence and who was also authorised to drive the vehicle in case of necessity. Thus at the time of the accident, it was the third respondent who was driving the vehicle. The Tribunal found that the accident occurred on account of the rash and negligent driving of the third respondent and awarded compensation against the first and third respondents. The third respondent filed an appeal and contended that he was not negligent and that he could not be made personally liable as he was driving the vehicle in the course of employment.

Held: The principle was clear that where a servant was acting within the scope of his employment and in so acting, did something negligent or wrongful, the employer was liable even though the acts done might be the very reverse of that which the servant was actually directed to do. In the present case, the third respondent was travelling in the jeep in the course of his duties for the purpose of delivering some medicines. The driver suddenly took ill. The third respondent had a licence to drive the vehicle and he had also been authorised to drive the Government's vehicle in case of necessity. If in the present circumstances, he considered that he had exercised his authority to drive, then there was nothing unreasonable on his part. It might be that on account of some negligence on his part he ran over the deceased But, that he was acting within the scope of the authority, could not be in dispute here. It would, therefore, follow that he had committed a tort in the course of his employment. He had to drive, in order to ensure the medicines reaching the destination. His driving was not by choice but by necessity. Consequently, the Court considered that in the present case, it was enough to pass the decree against the first respondent only and not against the third respondent. [*Para.* 6.]

Case referred to:—

P. N. Khanna v. *Balbir Singh Kohli*, 1972 A.C.J. 143; *Vanguard Fire and General Insurance Co., Ltd.*, v. *Sarala Devi*, A.I.R. 1952 Punj. 297; *Baylay* v. *Manchestor Shefiled and Lincolnshire Railway Company*, (1873) 8 C.P. 148; *Vimal Rai* v. *Gurcharan Singh*, 1967 A.C.J. 115; *Sitaram Motilal Kalal* v. *Santanu Prasad Jaishankar Bhati*, 1966 A.C.J. 89.

Appeal against the decree of the Court of Motor Accidents Claims Tribunal, Vellore, dated 2nd May, 1974 in M. A. C. T. O. P. No. 39 of 1971.

R. Vijayan and *P. Srinivasulu*, for Appellant.

J. R. Alwar Naidu and *S. Halathandapani*, for Respondent.

*A. A. O. No. 536 of 1974. *15th June*, 1978.

The Court delivered the following

JUDGMENT.—This appeal has been filed by the third respondent in M.A.C.T.O.P. No. 39 of 1971, in the Court of the Motor Accidents Claims Tribunal, North Arcot at Vellore. On 24th May, 1971, at about 3-50 P.M one Jeevaratna Mudaliar was run over by a Willy's jeep van belonging to the Malaria Eradication and Maintenance department of the Government of Tamil Nadu. The vehicle was driven by one Annamalai, who is the third respondent in the O.P. It was going on the Bangalore, Madras Trunk Road, and at a place near the Shenbakkam cross-road, very close to the Vellore Town, the accident occurred. The widow of the deceased Jeevaratna Mudaliar and her two daughters filed the O P. claiming compensation of Rs. 15,000. There are three respondents—the first is the State Government, the second is the driver and the third is the Officer who was travelling in the said vehicle at the time of the accident. Some time before the accident occurred, the second respondent had complained of chest pain, and therefore, he handed over the vehicle to the third respondent, who had a driving licence and who was also authorised to drive the vehicle in case of necessity. Thus, at the time when the accident occurred, it was the third respondent who was actually at the steering. The allegation of the petitioner was that the death of Jeevaratna Mudaliar was the direct result of the rash and negligent act on the part of the second and third respondents who are employees of the first respondent. The first respondent resisted the petition contending that the death of the victim was not due to any rash and negligent driving; that it was entirely due to the imprudent act on the part of the deceased, *viz.*, in darting across the road in the cycle that was coming behind that the police who had registered a case in this behalf, had 'referred' the matter and that the State could not be vicariously liable as the third respondent was not acting in accordance with the authority conferred on him. The third respondent in his counter disputed the allegation that he was driving the vehicle in rash and negligent manner. According to him he was driving the vehicle only at 15 to 20 miles per hour. Since there was heavy traffic on the road, he had kept himself to the extreme left. At the time of the accident, a lorry was coming opposite to him when Jeevaratna Mudaliar tried to dart across the road. Finding the lorry coming on the opposite direction, the victim got panicky and dropped the cycle on the middle of the road and dashed across the road obviously to avoid being knocked down by the lorry. It was, therefore, submitted that he was not at all liable.

2 The Tribunal framed the following two substantial issues or points for consideration, *viz.*—(1) Whether the accident was due to the rash and negligent act on the part of the third respondent; (2) and if the accident is due to the rash and negligent driving of the third respondent, whether the respondent was not liable for the tortious act of the third respondent.

3. On this point, it was held that the accident had occurred on account of the rash and negligent act of the third respondent and that both the first and third respondents would be liable for compensation. The compensation was fixed at Rs. 7500. The second respondent was exonerated as he was not driving the vehicle, and the first and third respondents had to pay the compensation as fixed by the Tribunal. The third respondent has alone filed this appeal.

4. Learned counsel for the appellant submitted that the Tribunal was wrong in proceeding as if there was any rash and negligent act on the part of the third respondent According to the learned counsel, the vehicle was proceeding only at a moderate speed and it was the negligence of the deceased that brought about the accident and loss of life. The Tribunal has discussed this aspect in paragraphs 7 and 8 of its judgment. This is a case of the victim dying on account of running over of the jeep. The victim was proceeding towards Vellore on his cycle on the northern-most portion of the road when the vehicle driven by the third respondent knocked him down. There was no suggestion to P.W. 2 who was the only witness examined on behalf of the claimant that the victim darted across the road, got panicky over the lorry coming from the opposite side and was rushing towards the other side after leaving his cycle in the middo of the road. P.W. 2 is a third party and an eye-witness to the occurrence, There is no reason to doubt his evidence which was to the effect that there was some negligence or rashness on the part of the third respondent, the appellant before me. After considering his evidence, I am not at all satisfied that the plea that the third respondent (appellant) was not negligent, can be accepted.

5. The next contention urged before me was that the appellant ought not to be made personally liable and that as he was driving the

vehicle in the course of his duty, the liability was only that of the first respondent, the State. On this point, the decision of the Delhi High Court in the case of *P.N. Khanna v. Balbir Singh Kohli and others*,[1] was cited before me. That case has considered some of the earlier pronouncements on the same point. In *Vanguard Fire and General Insurance Co. Ltd. v. Sarala Devi and others*,[2] a Division Bench of the Punjab High Court, enunciated the principles regarding the master's liability for a tort committed by a servant in the following terms:—

> "It is well established that the master is bound by the acts of the servant even if the act was unauthorised or even prohibited provided the act was within the scope of the service or employment. The principle is that when a servant does any act which he is authorised by his employment to do under certain circumstances and conditions and does it in a manner which is unauthorised and improper even then the employer is liable for the wrongful act of his servant".

This decision of the Punjab High Court is itself based on an earlier decision in *Bayley v. Manchester Sheffield and Lincolnshire Railway Co*[3]. In that case the principle laid down was that—

> "Where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant was actually directed to do."

These cases were followed in *Vimal Rai v. Gurchran Singh*[4] and also in the case in *P.N. Khanna v. Balbir Singh Kohli and others*[1] cited by the learned counsel for the appellant.

6. In fact, there is an earlier decision of the Supreme Court on this point in *Sitaram Motilal Kalal v. Santanu Prasad Jaishanker Bhatts*[5]. In the majority judgment in that case, the following passage occurs:—

> "A master is vicariously liable for the acts of his servant acting in the course of his employment. For the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. The driver of a car taking the car on the master's business makes him vicariously liable if he commits an accident. But it is equally well-settled that if the servant, at the time of the accident, is not acting within the course of his employment but is doing something for himself the master is not liable. There is a presumption that a vehicle is driven on the master's business and his authorised agent or servant but the presumption can be met".

Thus, the principle is clear that where a servant is acting within the scope of his employment and in so acting, does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant was actually directed to do. In the present case, the third respondent was travelling in the jeep in the course of his duties for the purpose of delivering certain medicines. The driver suddenly took ill and the problem was either to stop the vehicle and make some arrangement for transport or to take the medicines and deliver them at their destination. The third respondent, had a licence to drive the vehicle and he had also been authorised to drive the Government's vehicle in case of necessity. If in the present circumstances, he considered that he had exercised his authority to drive I do not consider that there is anything unreasonable on his part. It may be that on account of some negligence on his part he ran over the deceased. But, that he was acting within the scope of the authority, cannot be in dispute here. It would, therefore, follow that he had committed a tort in the course of his employment. By the decisions already mentioned, the vicarious liability of the master is clearly applicable. He had to drive, in order to ensure the medicines reaching their destination. His driving was not by choice but by necessity. To make him personally liable in such a situation would be manifestly unjust. Consequently, I consider that in the present case, it is enough to pass the decree against only the first respondent and not as against the 3rd respondent. The decree is accordingly modified. The appeal is allowed and there will be no order as to costs.

S.J. —— *Appeal allowed.*

1. (1972) A.C.J 148.
2. A.I.R. 1959 Punj 297.
3. (1873) 8 C.P 148.
4. (1967) A.C.J 115.
5. (1966) A.C.J 89.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Periasami Thevar .. *Petitioner**

v.

Namasivayam Pillai .. *Respondent.*

(A) *Tamil Nadu Cultivating Tenants Arrears of Rent Relief Act (XXI of 1972), section 3—Modes of discharge open under the Act—Payment by money order—Acceptance by landlord—Implied agreement inferred as to mode of payment—Money order sent within six months but received beyond six months tantamount to receipt in time—Held cultivating tenant entitled to receipt.*

(B) *Contract Act (IX of 1872), section 38 and agency.*

A cultivating tenant filed a petition claiming reliefs under the Tamil Nadu Act XXI of 1972. The landlord was a resident of Salem and the tenant was a resident of Sirkali. The tenant sent the current rent by 4 money orders. The last money order was sent on 10th February, 1973 and was received on 12th February and this related to Exhibit A-3. The claim of the cultivating tenant was negatived by the Court below on the ground that the last payment was received beyond six months, though the money order was sent on 10th February, 1973 which was within time. On revision filed by the tenant,

Held, The provisions of section 3 of the Tamil Nadu Act XXI of 1972 contemplate three modes of discharge namely, by payment, by deposit or by being deemed to have been paid or deposited. The mode adopted in the present case was one of payment. The question is, where the parties are not residing in the same city or village and where there is no possibility of immediate and direct contact with each other, what should be the mode that could be conveniently adopted by the cultivating tenant in making the payment. [*Para.* 2.].

The parties could agree to treat the post office as an agent of the payee. If the money was delivered to the post office within time, payment to the post office would constitute a valid payment to the payee. The date on which the money was paid into the post office would be the date of payment to the payee. An agreement to treat the post office as an agent of the payee need not necessarily be express, but could only be implied. If a particular mode of payment had been adopted by the payee and it had not been objected to or protested against immediately by the payee it could be stated that such a mode of payment was acquiesced in and accepted by the payee. If once the mode adopted had been acquiesced in and accepted by the payee, it was not open to him to put forth an objection with reference to the said mode at a later stage [*Para.* 12.]

On the facts of the present case, it was clear that not only once but on four occasions the cultivating tenant adopted the mode of payment by money order which had not been objected to or protested against by the landlord. No objection was also taken with regard to the mode of payment adopted, in the counter filed to the present application. Hence, in such circumstances, it would be reasonable to hold that an implied agreement to receive payments by money order could be spelt out. Hence the last money order with reference to Exhibit A-3 having been made and registered with the post office within time though received out of time, would constitute valid payment within time. [*Para.* 13.]

Even with reference to section 38 of the Indian Contract Act the position is that a creditor is not bound to accept a cheque, but if a cheque is tendered and received and the creditor or his agent objects only to the amount or makes no immediate objection at all, he cannot afterwards object to the nature of tender. [*Para.* 11]

Cases referred to:—

Kirloskar Bros. v. *Commissioner of Income-tax, Bombay*, A.I.R. 1952 Bom 306; *Rajaram* v. *Bisram* A.I.R. 1960 All. 747; *Nardhagham Ramlal* v. *M/s. Punjab and Pepsu Financiers Ambala Cantt.*, A.I.R. 1969 Punj. 340; *Commissioner of Income-tax, Bombay South* v. *M/s Ogale Glass Works Ltd. Ogale Wadi*, 1954 S.C J. 522: A.I.R. 1954 S C. 429; *Commissioner of Income-tax, Bihar and Orissa* v. *M/s. Patney and Company*, 36 I T.R 488 A.I.R. 1959 S C. 1070; *Radheyshyam* v. *Puttoolal*, A.I.R. 1961 All. 87.

Petition under section 8 of Act XXI of 1972 praying the High Court to revise the order

*C.R.P. No. 1312 of 1974. *5th April, 1978.*

of the Dt Munsif of Sirkali in E A. No. 380 of 1973 in O.S. No. 836 of 1971.

V. Sridevan, for *R. Balachandar*, for Petitioner

S. Pichai and *R. Subramanian*, for Respondent.

The Court made the following

ORDER.—The petitioner herein is a cultivating tenant under the Tamil Nadu Act XXI of 1972 (hereinafter referred to as ('the Act)'. The respondent herein is the landlord The cultivating tenant sought reliefs under the Act by filing a petition E. A. No. 380 of 1973 in O. S. No. 836 of 1971, on the file of the District Munsif of Sirkali. The said petition has been dismissed by the Court below and this revision is directed against the orders of the Court below.

2. In this case there is no dispute about the relationship between the parties. The current rent was paid by four money orders as follows. Money order relating to Exhibit A-2 was received by the landlord on 24th August, 1972; money order relating to Exhibit A-5 was received on 24th August, 1972: the money order relating to Exhibit A-4 was received on 8th February, 1973, and lastly the money order relating to Exhibit A-3 was received on 12th February, 1973. There is no dispute that this last money order was sent on 10th February, 1973. This covers a sum of Rs. 7. There is also no dispute before me that the amounts covered by all the money orders as well as commissions deducted will go to make up the 'current rent'. A contention was raised in the court below that the money order commissions deducted are excessive It must be pointed out that no such objection seems to have been raised in the counter so as to afford an opportunity to the cultivating tenant to substantiate his case by production of the relevant money-order receipts. It will not be fair to consider this objection when no specific plea has been taken in the counter. Admittedly the landlord was a resident of Salem at the relevant point of time and the cultivating tenant was a resident of Sirkali. So there was no occasion for immediate and direct contact between the parties. The provisions of section 3 of the Act contemplate three modes of discharge, namely, by payment, by deposit or by being deemed to have paid or deposited. The mode of deposit had not been adopted in the present case. The deeming provision does not directly come into play. The mode adopted is one of payment. The question is, where the parties are not residing in the same city or village and when there is no possibility of immediate and direct contact with each other, what should be the mode that could be conveniently adopted by the cultivating tenant in making the payment. In this case, the mode adopted is by sending the amounts by money order. Admittedly payments were received by the landlord more than once by money order. There was no protest by the landlord with reference to the mode of payment adopted. This mode of payment adopted by the cultivating tenant was acquiesced in and accepted by the landlord. There was no objection put forth by the landlord in the counter to the present application with reference to the mode adopted. When such is the case, I think it will be legitimate to draw an inference that the landlord accepted the mode of payment adopted by the tenant and an implied agreement with reference to such mode of payment can be spelt out from the facts and circumstances of the case.

3. The Court below did not countenance the case of the cultivating tenant on the main ground that the last payment under Exhibit A 3 was received by the landlord only on 12th February, 1973, that is, beyond the period of six months stipulated under the provisions of the Act.

4. Mr. V. Sridevan, learned counsel for the petitioner, submits that once an implied agreement can be spelt out and when once it is found that the money order relating to Exhibit A-3 was in fact registered with the postal authorities on 10th February, 1973, it must be held that there was a proper payment within time and the post office must be held to be an agent of the landlord, and payment of money to the post office for the purpose of being sent to the landlord by money order will constitute payment within time, to the landlord.

5. Mr. R. Subramanian, learned counsel for the respondent, submits that in the absence of any express agreement the mode of payment adopted by the tenant cannot be countenanced and it cannot be held that there was due payment within time and the money order with reference to Exhibit A-3 having been received by the landlord only on 12th February, 1973, the payment was out of time and there was no due compliance with the provisions of the Act and the cultivating tenant is not entitled to the reliefs under the Act.

6. In view of the above controversy that has been raised in this case, it would be relevant-

to consider some of the judicial precedents with reference to the implications of despatch through post, if adopted by parties. In *Kirloskar Brothers* v. *Commissioner of Income-tax, Bombay*,[1] the Bombay High Court was concerned with a case where there was a lack of nomination by the parties of the post office as an agent. In that context, the Bombay High Court observed that "it is only in those cases where the receiver nominates the post office as his agent that the posting of letter constitutes the receipt of it by the receiver at the time and at the place where the letter is posted".

7. In *Rajaram* v. *Bisram*[2] Tandon, J. was concerned with a case where there was no agreement, express or implied to pay into Court money payable under a compromise decree by money order and in the context of the case where the amounts were sent by money order and received by the Court beyond the stipulated time the learned Judge held that the post office cannot be held to be an agent of the Court, especially in view of section 44 of the Post Office Act.

8. In *Narbhagham Ramlal* v. *M/s. Punjab and Pepsu Financiers, Ambala Cantt*[3] Brandit, J. was concerned with a case where there was no stipulation to constitute the post office as an agent and the learned Judge held that where there was neither a stipulation in the compromise decree that the amount could be sent by money order nor the decree-holder specifically instructed the judgment debtor to remit it through a money order, it could not be said that the post office was the agent of the decree-holder. From the discussion of the above cases, it is clear that the Courts are prepared to constitute the post office as an agent of the receiver, if there could be a stipulation between the parties to that effect.

9. In *Commissioner of Income-tax, Bombay South* v. *M/s. Ogale Glass Works Ltd., Ogale Wadi*[4] the Supreme Court has observed that 'there can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee. Hence, from the above observation of the Supreme Court, it is clear that there could be a request by the payee and such a request could be acceded to and implemented between the parties.

10. In *Commissioner of Income-tax, Bihar and Orissa* v. *M/s. Patney and Co.*,[1] the Supreme Court laid down the position as follows:-

> "If it is shown that the creditor authorised the debtor either *expressly or impliedly* to send a cheque by post, the property in the cheque passes to the creditor as soon as it is posted. Therefore, the Post Office is an agent of the person to whom the cheque is posted if there be an express or implied authority to send it by post".

In *Radheshyam* v. *Puttoolal*[2] S. S. Dhavan, J., was concerned with a case where the benefits of a conditional order passed for restoring the suit was sought to be negatived on the ground that though the money order was registered in the post office within time, really, the amount was received by the other side out of time. On the facts of the case, the learned Judge observed "it is true that payment had not been made actually to the defendants on 27th July, 1953, but the amount was delivered to the post office on 24th July, for remittance to the defendants. A letter was sent to the Court that the money had been sent. It is not necessary for me to decide whether the payment to the post office under a money order amounts to payment to the addressee. But in this case, the plaintiffs, by writing to the Court that they had remitted the amount virtually put it beyond their power to recall the money. If after informing the Court he had revoked the money order, he would have been guilty of misconduct for which appropriate action might have been taken against him. For all practical purposes *this was virtual payment.*" The learned Judge declined to take a technical view of the word 'payment'.

11. Even with reference to section 38 of the Indian Contract Act, the position is that a creditor is not bound to accept a cheque; but if a cheque is tendered and received and the creditor or his agent objects only to the amount, or makes no immediate objection at

1. A.I.R. 1952 Bom. 306.
2. A.I.R. 1960 All. 747.
3. A.I.R. 1969 Punj. 340.
4. (1954) S.C.J. 572: (1954) 2 M.L.J. 67: A.I.R. 1954 S.C. 429.

1. 36 I.T.R. 488: A.I.R. 1959 S.C. 1070.
2. A.I.R. 1961 All. 87.

ill, he cannot afterwards object to the nature of the tender.

12. From the above discussion, it is clear that the parties can agree to treat the post office as an agent of the payee. If the money is delivered to the post office within time, payment to the post office will constitute a valid payment to the payee. The date on which the money was paid into the post office will be the date of payment to the payee. An agreement to treat the post office as an agent of the payee need not necessarily be express, but can also be implied. The authorisation can be express, or implied, is the view expressed by the Supreme Court in the decision above referred to. *Commissioner of Income tax, Bihar and Orissa* v. *M/s. Patney and Company*[1]. If a particular mode of payment has been adopted by the payer and it has not been objected to or protested against immediately by the payee it can be stated that such a mode of payment was acquiesced in and accepted by the payee. If once the mode adpoted has been acquiesced in and accepted by the payee, it is not open to him to put forth an objection with reference to the said mode at a later stage.

13. On the facts of the present ease, it is clear that not only once but on four occasions, the cultivating tenant adopted the mode of payment by money order which had not been objected to or pr tested against by the landlord. No objection was also taken with regard to the mode of payment adopted, in the counter filed to the present application Hence, in such circumstances, it would be reasonable to hold that an implied agreement to receive payments by money order can be spelt out and hence the last money order with reference to Exhibit A-3 having been made and registered with the post office within time though received out of time will constitute valid payment within time.

14. In this view, I am inclined to interfere in revision, and accordingly this revision petition is allowed and the orders of the Court below are set aside and the reliefs prayed for in the application E.A. No 380 of 197 will stand granted. There will be no order as to costs.

S.J. —— *Petition allowed.*

1. 36 I.T.R. 488: A.I.R. 1959 S.C 1070.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Padmanabhan, J.*

C. Palanisami Chetti .. *Appellant**

v.

Muruganna Gounder .. *Respondent*

Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955),—Cultivating tenant—Purchase of land from landlord — Earlier agreement for sale entered into by landlord with plaintiff—Plaintiff's suit for specific performance—Cultivating tenant 2nd defendant claiming protection under the Cultivating Tenants Protection Act—Claim negatived on ground of his ceasing to be tenant after his purchase.

The plaintiff filed a suit for specific performance of an agreement for sale (Exhibit A-8) executed in his favour by the first defendant agreeing to sell an agricultural land measuring 5.96 acres. Pending agreement, the first defendant sold the same land to the second defendant who was a tenant of that land, under Exhibit A-1 sale deed. The trial Court decreed the suit. The first and second defendants filed appeals. According to the second defendant, he was entitled to be in possession as a tenant and entitied to the protection and benefits of the Tamil Nadu Cultivating Tenants Protection Act.

Held From the date of Exhibit A 1 sale deed, the second defendant's possession ceased to be that of a tenant and the relationship of landlord and tenant, if any, that existed on that date ceased to be in force. In the circumstances, from the date of Exhibit A-1, the possession of the second defendant could be traced only to Exhibit A-1 sale deed. Hence it would not be open to the second defendant to fall back upon his possession as a tenant.

[*Para.* 12.]

Cases referred to:—

Muniyandi v. *Rajangam Iyer*, (1976) 1 M.L.J. 344: 89 L.W. 249: A.I R. 1976 Mad. 287; *Durga Prasad* v *Deepchand*, (1954) 1 M.L.J. 60: 67 L.W. 945: 1954 S.C.J. 23: 1954 S.C.R. 360: A.I.R. 1954 S.C. 75; *Annamalai Gounder* v. *Venkatasami Naidu*, (1959) 1 M.L.J 301: 72 L.W. 265: I.L.R. 1959 Mad. 796: A.I.R 1959 Mad. 354.

*A. S. Nos. 346 of 1975 and 88 of 1976

20th February, 1978.

Appeals against the decree of the Sub-Court of Coimbatore in O. S. No. 174 of 1974.

M. R. Narayanaswami and *P. S. Chinnappa*, for Appellant.

S. Gopalaratnam and *P. N. Venugopalan*, for Respondent.

The Court delivered the following

JUDGMENT.— While the first defendant in O.S. No. 174 of 1974 on the file of the Court of the Subordinate Judge, Coimbatore, is the appellant in A.S. No. 346 of 1975, the 2nd defendant is the appellant in A.S. No. 88 of 1976. The plaintiff Muruganna Gounder, filed the suit for specific performance of Exhibit A-8, dated 5th December, 1973, the agreement for sale executed by the 1st defendant (the appellant in A.S. No. 346 of 1975) in respect of the suit properties for Rs. 18,750. Under the said agreement for sale the 1st defendant received an advance of Rs. 2000 and undertook to execute the sale on receipt of the balance of consideration of Rs. 16,750 within a period of 3 months from the date of the agreement. The suit property is an extent of 5.96 acres comprised in S. No. 408/6 and 408/8. The plaintiff has always been ready and willing to perform his part of the agreement. Though he called upon the 1st defendant to receive the balance of sale consideration and execute the sale deed the latter was avoiding. Later on, the plaintiff came to know that the 1st defendant had executed Exhibit A-1 sale deed, dated 12th February, 1974 in favour of the second defendant for Rs. 16,000. The said sale deed is said to have been executed pursuant to an oral agreement for sale by the 1st defendant in favour of the 2nd defendant. It is averred by the plaintiff that there was no such oral agreement and though the consideration mentioned in Exhibit A-1, document was only Rs. 16,000 actually the 2nd defendant paid Rs. 24,000 to the 1st defendant. Exhibit A-1 sale deed itself was secretly executed at Coimbatore and not at Avanashi, which would have been the normal place for registration, just for the purpose of preventing the plaintiff from coming to know of the execution and registration of Exhibit A-1 sale deed. Even at the time the 2nd defendant took Exhibit A-1 sale deed he was aware of the prior agreement in favour of the plaintiff and that consequently he was not a *bona fide* purchaser for valuable consideration without knowledge of the earlier agreement for sale in favour of the plaintiff. It is on these allegations the plaintiff has filed the suit for the specific performance.

2. The 1st defendant in his written statement contended that the 2nd defendant was originally the tenant of the suit lands and that his tenancy rights have been recognised by the Tahsildar. To avoid any hitch with the 2nd defendant, the 1st defendant had agreed to sell the properties to the former for Rs. 16,000, as early as *Ippasi* 1973. As per the said oral agreement the sale deed has to be executed within six months. Subsequently, the plaintiff persuaded 1st defendant to enter into the suit agreement on the representation that he would get the consent of the 2nd defendant and that he would himself take possession of the suit property from the 2nd defendant. However, when the 2nd defendant came to know of Exhibit A-8 agreement in favour of the plaintiff, he refused to surrender possession and insisted that the 1st defendant should execute a sale deed in his favour pursuant to the earlier oral agreement for sale. As a result a Panchayat was held on 10th Feburary, 1974 and the Panchayatdars returned a verdict that the 1st defendant should return the advance amount of Rs. 2000 to the plaintiff, that Exhibit A-8 agreement for sale in favour of the plaintiff should stand cancelled, that the plaintiff should return the document to the Panchayatdars and that the 1st defendant should sell the property to the second defendant. The 1st defendant denied that the sale was for Rs.24,000 and not for Rs. 16,000. He further stated that the only remedy of the plaintiff was to return of Rs. 2000 from the 1st defendant.

3. The second defendant filed a separate written statement stating that he was a lessee in possession of the property for the last 20 years and that his rights as a lessee has been recognised by the Tahsildar under the Record of Tenancy Rights Act. When in *Ippasi* 1973 he learnt that the 1st defendant was intending to sell the property he approached the 1st defendant and offered to purchase the property for Rs. 16,000 to which the 1st defendant agreed. Pursuant to the said oral agreement he paid the sum of Rs. 2000 as advance payment to the 1st defendant and agreed to take the sale deed on payment of the balance consideration within a period of six months from the date of agreement. When he came to know of Exhibit A-8 agreement between the 1st defendant and the plaintiff, he

insisted on the document of sale being executed in his favour as a result of which a panchayat took place on 10th February, 1974. The Panchayatdars directed that he being a tenant in possession with an anterior agreement for sale in his favour was entitled to take the sale deed from the 1st defendant and that the plaintiff should receive back the advance paid by him and return the document. The plaintiff also bowed to the decision of Panchayatdars. He having taken Exhibit A-1 sale deed subsequent to the decision of the Panchayatdars, he was a *bona fide* purchaser for valuable consideration. He pleaded that Exhibit A-8 agreement was no longer subsisting and could not be specifically enforced. In any event, he pleaded that he was entitled to be in possession as a tenant and to fall back on his rights as a tenant and that he was entitled to protection and benefits of the Tamil Nadu Cultivating Tenants Protection Act.

4. On these pleadings the trial Court raised the following issues for consideration:

1. Whether the agreement of sale dated, 5th December, 1973 in favour of the plaintiff is true, valid and binding on the 2nd defendant?

2. Whether the prior oral agreement pleaded by the defendants is true ?

3. Whether the 2nd defendant is a cultivating tenant of the properties and entitled to the protection ?

4. Whether the 2nd defendant is a *bona fide* purchaser of the properties without the knowledge of the agreement dated 5th December, 1973?

5. Whether the alleged Panchayat is true ?

6. To what relief ?

The trial Court found that the prior oral agreement pleaded by the defendants was not true and that the agreement for sale dated 5th December, 1973 in favour of the plaintiff was true and valid. The trial Court also found that the alleged panchayat said to have been held on 10th February, 1974 was not true and that the 2nd defendant was not a *bona fide* purchaser for valuable consideration without knowledge of the agreement dated 5th December, 1973. The trial Court also found that the 2nd defendant was not a cultivating tenant of the property and was not entitled to the protection of the Tamil Nadu Cultivating Tenants Protection Act. At the time of arguments a point was raised before the trial Court that in view of the fact that under Exhibit A-21, the 2nd defendant had been recognised by the Record Officer as a tenant, the civil Court had no jurisdiction to go behind the said order. The trial Court negatived this plea. In the result, the trial Court passed a decree as prayed for with costs.

5. Both the defeated defendants have filed the above two appeals. The main argument was addressed by the learned counsel for the appellant in A. S. No. 88 of 1976 and the said arguments were adopted by the learned counsel for the appellant in A. S. No. 346 of 1975. Learned counsel for the appellants raised the following contentions:

> "1. The finding of the trial Court that the alleged oral agreement for sale of the suit property by the 1st defendant in favour of the second defendant was not there and that no panchayat was held on 10th February, 1974 was erroneous.
>
> 2. The 2nd defendant must in any event have been found to be a *bona fide* purchaser for valuable consideration.
>
> 3. The 2nd defendant ought to have been found to be in possession of the suit property as a cultivating tenant He has been recorded as a cultivating tenant by the Record Officer under the Record of Tenancy Rights Act in Exhibit A-21 proceedings. Consequently, under section 16-A of the said Act, the civil Court was bound by the said order and it had no right to go into the question once again. Consequently, the plaintiff would not in any event be entitled to a decree for recovery of possession of the suit property from the second defendant in the suit."

I shall first take up for consideration the first two contentions strenuously put forward by the learned counsel for the appellants. As already stated, the suit property is an undivided half share of an extent of 5.96 acres in S. No. 408/6 and 408/8. It is not disputed by the defendants that the first defendant executed Exhibit A-8 agreement for sale in favour of the plaintiff on 5th December, 1973 undertaking to sell the property to the plaintiff for Rs. 18,750 and that he received an advance of Rs. 2,000 on the date of Exhibit A-8. In the circumstances when the defendants set up a case of an oral agreement for sale by the 1st defendant in favour of the 2nd defendant to sell the identical property for Rs. 16,000 anterior to the date of Exhibit A-8 and further that consequent on the said oral agreement

and the execution of Exhibit A-8 agreement for sale by the 1st defendant in favour of the plaintiff, a Panchayat was held on 10th February, 1974 under which the Panchayatdars returned a verdict that Exhibit A-8 should stand cancelled and that the plaintiff agreed to the same the burden is heavy on the defendants to prove their case. A part from the defendants 1 and 2, seven witnesses have been examined on the side of the defendants. The written statement does not give any specific date on which the oral agreement is said to have taken place. It is merely mentioned that the agreement took place in Ippasi 1973. The 2nd defendant has stated in his written statement that when he learnt that the 1st defendant was intending to sell away the suit property he approached him in Ippasi 1973 and offered to purchase the property for Rs. 16,000. The 1st defendant agreed to do so, and accordingly the 2nd defendant had paid an advance of Rs. 2,000 in Ippasi itself and concluded the agreement for sale. D.W. 7 Ramasami Gounder has deposed that one Marappa Gounder, Murugesa Gounder, Arumugha Gounder and himself talked about the sale of the suit property to the 2nd defendant in Ippasi 1973. The talk took place in the 1st defendant's shop and it was decided that the 1st defendant should sell the property for Rs. 16,000. D.W. 8 Murugesa Gounder also has deposed on the same lines as D.W. 7. It has to be noted that neither D W. 7 nor D.W. 8 has spoken to the fact that any difference of opinion existed between defendants 1 and 2 on that date as regards the quantum of consideration for which the property should be sold by the 1st defendant to the 2nd defendant which needed any arbitration by the Panchayatdars. But it is significant to note that the 1st defendant had stated that there was difference of opinion as regards the sale consideration between himself and the 2nd defendant and that it had to be settled by arbitration. According to defendants 1 and 2 there was a Panchayat for fixing the sale price on the date of the prior agreement. The written statement does not mention about any panchayat being held for the fixation of the price. The 2nd defendant D.W. 3 has given evidence that his father knew about the anterior oral agreement of sale with the 1st defendant and as a matter of fact the sum of Rs. 2,000 to be advanced to the 1st defendant was given by his father. If that were so, one would expect that the father of the 2nd defendant would have referred to the anterior oral agreement by the 1st defendant in favour of his son, the 2nd defendant in Exhibit A-9 notice dated 4th January, 1974 sent by him to the plaintiff. Curiously, no reference at all is made about this oral agreement in Exhibit A-9. On the other hand, the 2nd defendant's father has categorically mentioned in Exhibit A-9 that he has been in possession of the suit property as a lessee from 1st December, 1965. Further D.W. 3 himself has admitted in his evidence that he came to know of Exhibit A-8 within a week after its execution. If his case that he has been in possession of the property as a tenant for nearly 20 years and that because of that he entered into an agreement for sale with the first defendant for the purchase of property in Ippasi 1973 is true, he would have immediately taken steps to inform the plaintiff about the anterior oral agreement in his favour. However, he remains quiet till 16th January, 1974 on which date alone he sends a notice to the plaintiff. In this connection, it is also necessary to state that while D.W. 3 has stated that he had been in possession of the suit property for nearly 20 years, the 1st defendant has categorically asserted in his chief examination that till 1971 he was personally cultivating the property and that the 2nd defendant was assisting him in his work. This also clearly falsifies the case of the defendants that because the 2nd defendant was already in possession of the property as a cultivating tenant he approached the 1st defendant for the sale of the property to him and that resulted in an oral agreement for sale. In fact the 2nd defendant himself has contradicted the 1st defendant by stating that it is not correct to state that he was assisting the 1st defendant in cultivation. It has to be noted that the 1st defendant has clearly stated in his evidence that the plaintiff approached him and offered to purchase the property on his own responsibility of tackling the second defendant and recover possession of the property from him. On the basis of this he, the 1st defendant immediately sent word to the 2nd defendant but the 2nd defendant did not give him any reply. Therefore, he felt disappointed and he entered into the agreement for sale with the plaintiff. If really there was an oral agreement in favour of the second defendant, the second defendant would have immediately gone to the first defendant and insisted that he should not enter into any agreement of sale with the plaintiff. That he did not do this also falsifies the case of the alleged oral agreement.

6. Allied to the question regarding the truth or otherwise of the alleged anterior oral agreement, it has also to be considered whether there was any Panchayat held on 10th February, 1974 as has been alleged by defendants 1 and 2 in their written statements. As regards the panchayat the first defendant as D. W. 1 has deposed that when the second defendant complained to him about his having entered into an agreement for sale with the plaintiff and wanted him to execute a sale in his favour the first defendant told him that they should, if necessary, settle the matter under panchayat. He has further stated that he subsequently came to know that many panchayats were held. There is absolutely no evidence in the case or even a plea in the written statement that there was any panchayat other than the one that was said to have been held on 10th February, 1974. He has further deposed that the plaintiff went and told him that the second defendant has arranged for a panchayat and that the villagers and the president of the panchayat were putting pressure on him and therefore, things should be done after due deliberation. The first defendant is clear that he did not send for the Panchayatdars. According to him, the reason which induced the Panchayatdars to direct the sale deed being executed in favour of the second defendant was that he was the only blacksmith in the village. The second defendant as D. W. 3 has stated that he did not call anybody as Panchayatdar. He has stated that the first defendant asked him to bring D. W. 9, and when he went to bring him all the Panchayatdars were present. He has also stated that D. W. 8 and one of the alleged Panchayatdars and the plaintiff contested an election and they were not on talking terms. Of course, he feigned ignorance when a suggestion was made to him whether the plaintiff along with the other villagers had filed an application to the authorities objecting to the issue of a revolver licence to D. W. 8. D. W. 7 has stated that the second defendant sent for him and the other Panchayatdars. He has also stated that the reason for the decision of the panchayat that the property should be sold to him was that the second defendant happened to be the only carpenter in the village. According to him the first defendant and the plaintiff brought the other Panchayatdars. This is not spoken to by the first defendant, while the plaintiff has denied the very holding of the panchayat itself. D. W. 8 stated that he did not know who sent word to the plaintiff asking him to come for the panchayat. D. W. 9, the President of the panchayat has stated that the amount of Rs. 2,000 was with him for two to three months, but the plaintiff refused to take the money and return the document. The trial Court has also referred to Exhibit A-20, the notice sent by the plaintiff to the first defendant which ought to have been delivered to the first defendant on 11th February, 1974 but the endorsement on the cover of Exhibit A-20, shows that it was taken to the first defendant on a number of times and that he was not available. When D. W. 1 was specifically questioned about this he has stated that he did not remember whether he was absent from the place and that if he had been at the place he would have received the letter. Exhibit A-20, office copy of which is Exhibit A-4 was sent on 8th February, 1974. By Exhibit A-4 or Exhibit A-20, the plaintiff had called upon the first defendant to execute the sale deed in terms of Exhibit A-8 agreement for sale. It is unbelievable that the plaintiff, two days after he sent Exhibit A-4 would have agreed to the holding of a panchayat and submitted to the verdict of the panchayat cancelling Exhibit A-8, agreement for sale. The evidence of the first defendant as D. W 1 that if he were in Avanashi at the time Exhibit A-20 was sent he would have received the same would show that he was not in Avanashi itself at the relevant period or he deliberately evaded receipt of Exhibit A-20 notice and in collusion with the second defendant set up a false case of alleged panchayat. The lower Court also took note of the fact that if really the panchayat was true there was no necessity for the first defendant to issue a notice under Exhibit A-5 dated 15th February, 1974. While the panchayat is said to have been held on 10th February, 1974. Exhibit A-1 has been executed and registered at Coimbatore on 12th February, 1974. D.W. 2 is a scribe of the original of Exhibit A-1. D.Ws. 7 and 8 have attested. The original sale deed has not been produced. The alleged reason given by D.W. 2 for registering the document at Coimbatore and not at Avanashi which was normally the place of registration of Exhibit A-1 sale deed is that no stamp papers were available at Avanashi. The trial Court has discussed the evidence of D.Ws. 2 and 3 and has not accepted the explanation. The proximity of the dates of the panchayat and the execution of Exhibit A 1 sale deed and the fact that the attestors and the scribe were all taken from Avanashi would go to show that the document was executed at Coimbatore only with the intention that the plaintiff

should not come to know of the execution and registration of Exhibit A-1 sale deed. It is also borne out by the evidence that there was enmity between the plaintiff and D.W. 7, and D.Ws. 7 and 9 are co-brothers. There is also suggestion of enmity between D.W. 8 and the plaintiff on the ground that the plaintiff had not paid the commission due to the former for having purchased a land. On a careful examination of the oral evidence let in on the side of the defendants which are discrepant, I agree with the conclusion of the trial Court that the alleged anterior oral agreement for sale of the suit property between defendants 1 and 2 is not true. I further confirm the finding of the trial Court that the alleged Panchayat said to have been held on 10th February, 1974 under which the plaintiff is said to have agreed to have Exhibit A-8, agreement for sale, cancelled, is also not true. In the light of those findings, I further hold that Exhibit A-8 agreement for sale is true and valid and subsisting on the date of suit.

7. There is no dispute that at the time the second defendant took Exhibit A-1 sale deed from the first defendant he was aware of Exhibit A-8, agreement for sale executed by the first defendant in favour of the plaintiff. When once the plea of the defendants regarding an anterior oral agreement and the alleged panchayat have been found it has been only to be found that the second defendant is not a *bona fide* purchaser for valuable consideration.

8. The next contention of the learned counsel for the appellant is that the second defendant is a cultivating tenant in possession of the suit property and has been so for the last 20 years. I have already referred to the evidence of the first defendant as D.W. 1 that till 1971, he was personally cultivating the suit property and that the second defendant was only assisting him. In this respect the second defendant as D.W. 3 has contradicted the first defendant. He has also denied the fact that he and his father were pannials under the first defendant. He has admitted that his father gave Exhibit A-9 notice to the plaintiff claiming himself to be in possession as a cultivating tenant.

9. In his cross-examination D.W. 2 has stated that by mistake in Exhibit A-2 it has been stated that he had been a cultivating tenant for 20 years. He has not produced any receipts for the payment of the lease amount. He has admitted, it is not stated in Exhibit A-1 that he was in possession as a cultivating tenant. Added to all this, the trial Court has laid emphasis on the following words —நான் சர்வசுதந்திரமாய் ஆண்டு அநுபவித்து வருவதுமான used be the vendor, the first defendant in Exhibit A-8. In the circumstances, I agree with the trial Court that the plea of the second defendant that he was in possession of the suit property as a tenant is not true and that his alleged possession can only be traced to Exhibit A-1 sale deed. However, learned counsel for the appellant draws my attention to the fact that under Exhibit A-21, dated 18th January, 1974, the second defendant had been recognised as a tenant by the Record Officer under the Tamil Nadu Agricultural Lands Record of Tenancy Act, 1969 (Tamil Nadu Act X of 1969). What happened was, defendants 4 to 6 who were in possession of the other half of suit property No. 408/6 and 408/8, applied under the said Act to the Record Officer for being recognised as tenants. During the said enquiry, the officer enquired of defendants 4 to 6, as to who was in possession of the other half and on the basis of their answer that the second defendant was in possession the second defendant's name was included as a tenant. However, on the basis of Exhibit A-21 order, the learned counsel argues that under section 16-A of the said Act 'no civil Court shall have jurisdiction in respect of any matter which the Record Officer, the District Collector or other Officer or Authority empowered by or under this Act has to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken by such offieer or authority in pursuance of any power conferred by or under this Act

10. A Bench of this Court in *Muniyandi* v. *Rajangam Iyer*[1] in dealing with the jurisdiction of the civil Court held as follows:—

"Section 16-A of Act X of 1969, admits of no doubit that a civil Court has no jurisdiction to decsde any matter which the Record Officer, District Collector or other officer or authority empowered by or under the Act should determine. The Court is also forbidden from granting injunction in respect to any action taken or to be taken by such officer or other authority in pursuance of any power conferred by or under the Act. The Act indicates and provides for the remedy to correct the record by following the proce-

1. (1976) 1 M.L.J. 344: 89 L.W. 249: A.I.R 1976 Mad. 287.

dure laid down. Until the contrary is proved, or a new entry is lawfully substituted therefor, the entry shall be presumed to be correct."

Mr. Gopalaratnam for the respondent submits that Exhibit A-21 amounts only to a draft declaration under section 3 (4) of the Act. After the draft declaration the further procedure contemplated under sections 3 (5), 3 (6), 3 (7) and 3 (9) has to be followed, and thereafter under section 3 (9) the record officer shall prepare the final record of tenancy right for the village and the said final record shall be published in the Fort St. George Gazette and the record so published shall be called the approved record of tenancy rights. The approved record of tenancy rights shall also be published in the District Gazette of the District in which the village is situated and in such other manner as may be prescribed. This is laid down in section 3 (10). Under section 15 an entry in the approved record of tenancy rights shall be presumed to be true and correct until the contrary is proved or a new entry is lawfully substituted therefor. Therefore, according to the learned counsel for the respondent no finality attaches itself to a draft declaration made in Exhibit A-21 order and that consequently the bar of suit under section 16-A of the Act cannot be attracted. The learned counsel further submits that on the facts of the present case it would be unnecessary for me to go into this question as it does not properly arise for consideration at all.

11. Mr. Gopalaratnam submits that even assuming without admitting that the second defendant was in possession as a cultivating tenant prior to the date of Exhibit A-1, the moment he took Exhibit A-1, from the first defendant, his character of possession changed from that of a lessee into that of the owner. Section 111 (*d*) of the Transfer of Property Act states— "A lease of immovable property determines in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right". In Mulla's Transfer of Property Act, 1882, 6th Edn., at page 741, it is stated as follows:—

> "When a leasehold and a reversion coincide there is a merger of a lesser estate in the greater. The leasehold is the lesser estate, for, it is carved out of the estate of the owner, which is the reversion. The lesser estate is merged, that is, sunk or drowned in the greater. The lease determines, for it sinks into the reversion. Thus, if the lessor purchases the lessee's interest the lease is extinguished, as the same man cannot be at the same time both landlord and tenant."

On this question, this position has not been accepted by the Court below on the ground that the sale in favour of the second defendant by the first defendant was invalid. This is clearly wrong. In *Durga Prasad* v. *Deepchand*[1] the Supreme Court considered the proper form of decree to be passed in a suit for specific performance of a contract for sale of land against the vendor and the subsequent transferee with notice of the prior agreement for sale to the plaintiff and held that the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff, and he does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff, this was held so on this basis that title to the properties validly passed from the vendor to the subsequent transferee and that the sale to him later was not void but only voidable at the option of the earlier contract. Again in *Annamalai Gounder* v. *Venkatasami Naidu*[2] after the expiry of the period of lease a registered agreement was entered into between the parties whereby the leased properties were to be sold to the lessee. The balance of the consideration was tendered, but the landlord improperly declined to accept the same and a sale deed was not executed. An application for eviction was made by the landlord under Act XXV of 1955. In that context, Ganapathia Pillai, J. held as follows:

> "It is obvious that till the contract of sale was entered into, the petitioner only occupied the position of lessee. But, after the date of the contract and after it was performed in part by consideration being paid for the contract and the landlord allowing the tenant to remain in possession by reason of the new status created under the contract, it was no longer open to the landlord to contend that the right of possession claimed by the petitioner was referable to the contract of lease........The moment

1. (1954) 1 M.L.J. 60: 67 L.W. 945: 1954 S.C.J. 23: 1954 S.C.R. 360: A.I.R. 1954 S.C. 75.

2. (1959) 1 M.L.J. 301: 72 L.W. 265: I.L.R. (1959) Mad. 796: A.I.R. 1959 Mad. 354.

possession is taken or continued under the contract of sale, the original relationship of landlord and tenant ceases to exist and the landlord cannot take advantage of the provisions of the Madras Cultivating Tenants Protection Act to file an application for eviction........ It is manifest that before any proceeding for eviction could be taken under the Madras Cultivating Tenants Protection Act, the relationship of landlord and tenant must subsist both on the date when the cause of action arose and when the application was made...... The relationship of landlord and tenant ceased to exist when the contract of sale was entered into and was performed in part."

12. In the present case, there is a sale in favour of the second defendant by the first defendant under Exhibit A-1 and the title of the first defendant passed on to the second defendant as on the date of Exhibit A-1. Consequently, from the date of Exhibit A-1, sale deed, the second defendant's possession ceased to be that of a tenant and the relationship of landlord and tenant. if, any, that existed on that date ceased to be in force. In the circumstances, from the date of Exhibit A-1, the possession of the second defendant can be traced only to Exhibit A-1 sale deed. I, therefore, hold that it would not be open to the second defendant to fall back upon his possession as a tenant. Once I find that Exhibit A-1 is liable to be avoided by the plaintiff on the foot of Exhibit A-8, agreement for sale, the appeal filed by the second defendant as well as the appeal filed by the first defendant have to necessarily fail. In the result, I confirm the judgment and decree of the trial Court and dismiss the appeals with costs of the contesting respondent, one set.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Mohamed Abdul Kader Maricair, *alias* M. M. Maricair, represented by Power of Attorney Agent, Idris Maricair

.. *Petitioner**

v.

The State of Pondicherry, represented by its Chief Secretary, Pondicherry

.. *Respondent.*

Pondicherry Land Reforms (Fixation of Ceiling on Land) Act (IX of 1974), sections 2 (26), 4 (1)—Private trust — Lands belonging to—Private trust a 'person' under the Act entitled to hold land—Cannot be clubbed with the holdings of the founder.

There was no specific provision in the Pondicherry Land Reforms (Fixation of Ceiling on Land) Act which treated the land held by a private trust as the lands of the founder. In the absence of a specific provision stating that the lands held by the private trust shall be taken as lands held by the founder, the Authorities could not invoke the provisions of the Act relating to public trust to justify the inclusion of the lands held by the private trust with the holding of the founder. So long as the Act treated the private trust as a 'person', the private trust was entitled to hold the ceiling extent of six standard hectares under section 4 (1). [*Para.* 3.]

Petition under section 50 of the Pondicherry Land Reforms Act, 1973 (Fixation of Ceiling on Land) Act (IX of 1974) praying the High Court to revise the Order of the Court of Land Tribunal (Subordinate Judge), Karaikal, dated 9th March, 1977 and passed LTCMA No. 4 of 1977 (Order M.L.I/101 of 1976 on the file of the Authorised Officer, Land Reforms, Karaikal).

The Court made the following

ORDER.—The petitioner is the founder of a private trust known as M. M. Maricair Trust.

* C.R.P. No. 841 of 1977.

22nd December, 1978.

The said trust had been created by him on 15th December, 1970. In proceedings initiated under the Pondicherry Land Reforms (Fixation of Ceiling on Land) Act, 1973, hereinafter referred to as the Act, the lands held by the said trust have been included in the holding of the petitioner and the petitioner's holding was determined as 20-4028 standard hectares by the Authorised Officer. The said computation of the extent of the petitioner's holding by the Authorised Officer was challenged before the Land Tribunal by the petitioner. The Land Tribunal also affirmed the view taken by the Authorised Officer. The petitioner has therefore come before this Court by way of this revision petition.

2. Before me, the learned counsel for the petitioner contends that though the document is styled as a family trust it is in fact a public trust and therefore properties owned by the said trust will not be covered by the provisions of the Act. The learned counsel has taken me through the trust deed, dated 15th December, 1970 under which an extent of 3 velies 8 mas and 68 kulies have been endowed for carrying out the objects set out in the trust deed. Under the trust deed the founder has appointed his eldest son Mohammed Idress Maricair, as the sole trustee. The trust is irrevocable for a period of 25 years. The objects set down in the trust deed is that from and out of the income from the trust properties two sums of Rs. 25,000 each are to be paid to the grandson and grand-daughter of the trustee and out of the balance of the income, 50% is to be distributed to his sons and daughters and the other 50% to be accumulated for a period of 25 years and thereafter distributed to his sons and daughters. Both the Authorised Officer and the Land Tribunal have held that the trust in question is purely a private trust and therefore the lands covered by the trust deed should be taken to be within the holding of the founder. After going through the objects of the trust as set out in the trust deed I am clearly of the view that the trust cannot be called in any sense a public trust as contended by the learned counsel for the petitioner. Therefore, the trust cannot claim any exemption from the provisions of the Act as a public trust. Once the trust cannot claim exemption as a public trust the question is whether the lands held by it can be clubbed with the holding of the founder as has been done in this case. According to the learned counsel for the petitioner even on the basis that the trust deed created by the petitioner under the document dated 15th December, 1970 is not a public trust but only a private trust, the private trust as coming within the meaning of a 'person' as defined under the Act, is entitled to hold a ceiling extent of six standard hectares under section 4 (1) of the Act. In this case, the definition of a person in section 2 (26) takes in a company, family firms, society or association of individuals (whether incorporated or not) or by a private trust or a public trust. Therefore, a private trust will squarely come under the said definition of a person. Section 4 (1) enables every person to hold six standard hectares as his ceiling area. Therefore a private trust which comes under the definition of a person can also hold the ceiling extent referred to in section 4 (1) of the Act.

3. However in this case, the lands held by the private trust has been included in the holding of the founder and such inclusion has been upheld by the Tribunal. The reason given by the Authorised Officer and the Tribunal for such inclusion is that as the private trust is not exempted from the provisions of the Act, the lands covered by the trust deed will have to be included in the holding of the founder. They have also given another reason for justifying that inclusion. They said under section 4 (*v*) (*a*) even the lands held by a public trust have been deemed to be held by the founder of the trust or his heirs if a substantial portion of the income from the trust is appropriated for the benefit of the founder or his family members and therefore the lands held by a private trust exclusively for the benefit of the family members of the founder have also to be included in the holding of the founder. It is true section 2 (30) defining a public trust provides that if the income from the trust is substantially appropriated for the benefit of the founder of the trust or heirs or of his family members, such trust shall be deemed to be a private trust notwithstanding the terms of the trust. Section 5 (1) deals

with such deemed private trust which comes under the proviso to section 2 (30). That section says as follows:—

> "Where under the terms of a public trust any interest either in the land in respect of which the public trust is created or in the income from such land is reserved in favour of the founder of such public trust, the authorised officer shall declare the extent of land which bears to the total extent of land held on the appointed day in respect of which the public trust is created, the same proportion as such interest bears to the total interest in such land or the income therefrom".

Under section 4 (*v*) (*a*), the land held by the public trust referred to in the proviso to clause (30) of section 2 shall be deemed to be held by the founder or his heirs. Sections 4 (*v*) (*a*) and 5 deal with the public trust which is deemed to be a private trust under the proviso to section 2 (30). But, there is no such provision in cases of private trusts coming under section 2 (29). In this case, for determination of the ceiling area of a deemed private trust section 4 (5) (*a*) has been invoked for clubbing lands of the private trust with that of the founder. I do sot see how the provisions relating to a public trust can be invoked in the case of a private trust. Admittedly, there is no specific provision in the Act which treats the lands held by a private trust as the lands of the founder. There is a special provision in respect of the public trusts which are deemed to be private trust under the proviso to section 2 (30). I am of the view, in the absence of a specific provision stating that the lands held by the private trust shall be taken as lands held by the founder the authorities cannot invoke the provisions of the Act relating to the public trust to justify the inclusion of the lands held by the private trust with the holding of the founder. So long as the Act treats the private trust as a person, the private trust is entitled to hold the ceiling extent of six standard hectares under section 4 (1). In this case it has been treated as the holding of the founder and this is in my view without any justification under the provisions of the Act.

4. One other reason given by the Authorised Officer as well as the Tribunal is that the trust deed has been registered only after the appointed day and therefore it cannot be taken into account and the lands dealt with in the trust deed should be taken to be the lands of the founder. Though the trust deed came to be registered after the appointed day, the trust deed has been executed on 15th December, 1970 long before the appointed day. It is well-established that a document once registered will date back and be effective from the date of the execution. There is no finding by the authorities below that the document has been ante-dated though the execution was after the appointed day. So long as there is no finding that the document is ante-dated it has to be presumed that the document has been executed on 15th December, 1970 and that is long before the appointed day. From the mere fact that the document came to be registered after the appointed day, it cannot be said to have come into existence after the appointed day. The transfer of title under the trust deed takes place from the date of the execution of the trust deed even though the document is registered later. In this view of the matter the order of the Authorised Officer and the Land Tribunal are set aside and the matter is remitted to the Authorised Officer for fresh disposal after excluding the lands belonging to the trust from the petitioner's holding and determine the ceiling area of the private trust separately. No costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, J.*

C. Muthu Bhattar .. *Petitioner**

v.

The Authorised Officer (Land Reforms), Madurai .. *Respondent.*

(A) *Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of* 1961), *section* 9 (2) (*b*)—*Return furnished by petitioner—Statement prepared on the basis of the return — Failure to give opportunity to petitioner to represent—Not fatal to the case.*

(B) *Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of* 1963)—*Lands in question minor inam land —Ryotwari patta issued to petitioner—Inclusion of those lands in petitioner's holding not correct.*

From the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act it is clear that the opportunity contemplated in section 9 (2) (*b*) of the Act is only in respect of cases where the party does not furnish any information under section 8 of the Act. Admittedly the petitioner had furnished information and a statement was prepared on the basis of the return so filed by him under section 8 (1) of the Ceiling Act. Hence the contention that failure to give opportunity to make representation, under section 9 (2) (*b*) of the Ceiling Act is fatal, cannot be appreciated inasmuch as the draft statement was published on the basis of the return furnished by the petitioner under section 8 (1) of the Ceiling Act. The provision in section 9 (2) (*b*) of the Ceiling Act need not be invoked. [*Para.* 7.]

An extent of 44.70 acres of land included by the Authorised Officer in the holding of the petitioner were minor inam lands and a ryotwari patta was granted to the petitioner under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963). The petitioner opposed the inclusion of those lands in his holding on the ground that he can enjoy the lands only so long as he continues to render the services of *sthanikam* and *archaka*. Even though patta had been granted in the name of the petitioner, he had not paid the compensation specified in the Act to enable him to become the absolute owner of the lands. Admittedly the lands measuring about 44.70 acres were service inam lands even though patta had been granted in favour of the petitioner herein. Inasmuch as these 44.70 acres of lands were inalienable they cannot be considered as lands of a person who is entitled to hold the same in section 7 of the Ceiling Act. The lands of this nature held by a person cannot come under the definition in section 5 (19) of the Act, since, he who is holding such service hands, can be considered neither the owner nor a possessory mortgagee, nor a tenant, nor an intermediary. The definition of owner in section 3 (33) of the Ceiling Act, will not also apply to a person who holds such service inam lands. The inclusion of the 44.70 acres of land for the purpose of calculating the ceiling area of the petitioner's holding was not correct.

[*Para.* 17.]

Cases referred to:—

Radhaswami Charitable Society v. *Authorised Officer, Land Reforms,* (1971) 2 M.L.J. 35: 84 L.W. 379: A.I.R. 1971 Mad. 458; *Lakshmana* v. *Rama Iyer,* 1953 S.C.J. 420: 1953 S. C. R. 848: (1953) 1 M.L.J. 834: A.I.R. 1953 S.C. 304; *Anjaneyulu* v. *Sri Venugopala Rice Mill Ltd.*, (1922) I.L.R. 45 Mad. 620: 15 L.W. 513: 42 M.L.J. 477: A.I.R. 1922 Mad. 197; *Ramanathan Chettiar* v. *Kalidasa Kavandan,* (1936) 71 M.L.J. 398: 44 L.W. 505: A.I.R. 1936 Mad. 559; *Masummayaya* v. *Official Receiver,* (1942) 2 M.L.J. 504: 55 L.W. 67; *Ramakrishnamma* v. *Venkatasubbiah,* 1943 Mad. 72; *Gopal Naidu* v. *Special Tahsildar for Land Acquisition,* (1974) 87 L.W. 67; *Ramakishnamma* v. *Venkatasubbiah,* (1934) 40 L.W. 918: 68 M.L.J. 46: I.L.R. 58 Mad. 389: A.I.R. 1935 Mad. 252.

V. Ratnam, for *K. Srinivasan,* for Petitioner.

The Additional Government Pleader, for Respondent.

* C.R.P.No. 3616 of 1973.

24th January, 1979.

The Court made the following

ORDER:—One Muthu Bhattar has filed this revision petition under section 83 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) (hereinafter referred to as the Ceiling Act in this judgment) questioning the validity of the order passed by the Authorised Officer (Land Reforms) Madurai, as Land Tribunal constituted under the Act.

1-A. On the basis of the return furnished by the petitioner herein under section 8 (1) of the Act, and on the materials collected through the field staff of the department, a draft statement containing the particulars of all lands held by him as 6th April, 1960 was prepared, and it was published in Supplement to Part III—No. 10 MM of the *Tamil Nadu Government Gazette*, dated 14th March, 1973 as required in section 10 (1) of the Act. The draft statement was served on the petitioner on 22nd March, 1973. He filed a statement of objections to the draft statement on 19th April, 1974. The petitioner was heard in person on 21st May, 1973 and 2nd July, 1973 and during that time he filed documents, which have been marked as Exhibits P-1 to P-7. Arguments were heard on 24th July, 1973 by the Authorised Officer, and the Authorised Officer, observing that no notice under section 9 (2) (*b*) of the Act is necessary since the draft statement was prepared on the basis of the materials furnished by the party and the petitioner is not entitled to exclude 44.70 acres on the ground that ryotwari patta was granted under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963), held that the petitioner has to offer surplus lands of an extent of 20.385 L.C. standard acres and that the required lands will be selected from his holding and final statements published under section 12 of the Act. The order of the Authorised Officer further states that as regards the selection of surplus lands, a separate notice was being issued granting two weeks time to specify the details of surplus lands.

2. Aggrieved by the order of the Authorised Officer, the petitioner herein filed C.M.A. No. 451 of 1973 before the Land Tribunal, Madurai. The Land Tribunal confirmed the order of the Authorized Officer both on the question of issuing notice under section 9 (2) (*b*) of the Act and also on the question of excluding lands for which ryotwari patta was granted under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963).

3. Aggrieved by the decisions of the Authorities below, the petitioner was preferred the above civil revision petition.

4. Mr. Ratnam, the learned counsel appearing for the petitioner took me through the orders of the Authorities below and also through the relevant provisions of the Act and the Tamil Nadu Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963), in order to substantiate his contentions to the effect that the Authorities below erred in not issuing a notice under section 9 (2) (*b*) of the Act and that they have gone wrong in including minor inam lands for which ryotwari patta was granted, while calculating the surplus lands.

5. Mr. K. Govindarajan appearing on behalf of the Additional Government Pleader contended that no notice under section 9 (2) (*b*) of the Act is necessary, inasmuch as particulars were furnished by the petitioner himself and that the Authorities below have correctly included minor inam lands for which ryotwari patta was granted in favour of the petitioner.

6. I have carefully gone through the relevant statutory provisions and also the orders of the Authorities below.

7. It is seen from the facts of the case that a draft statement containing the particulars of the lands held by the petitioner as on 6th April, 1960 was prepared and published from the materials furnished by the petitioner under section 8 (1) of the Ceiling Act and also on the material collected from the field staff of the department. Section 9 of the Ceiling Act deals with cases where the party fails to furnish the return under section 8 or where the party furnishes incorrect or incomplete return under that section. In such cases, the Authorized Officer may, by notice, require such person to furnish the return or the additional particulars, as the case may be, within the time specified in the notice, or within such further time not exceeding thirty days as the

Authorized Officer may, in his discretion, allow. Section 9 (2) (*a*) of the Ceiling Act reads as follows:

"Where any person, on whom notice under sub-section (1) has been served, fails to furnish the return, or the additional particulars, as the case may be, within the time specified in that notice, or within the further time allowed by the Authorised Officer under sub-section (2) the Authorised Officer may obtain in such manner as may be prescribed the necessary information either by himself or through such agency as he thinks fit."

Section 9 (2) (*b*) of the Ceiling Act reads as follows:—

"The Authorised Officer, shall, as soon as may be, after obtaining the information under clause (*a*), give to the person concerned a reasonable opportunity of making his representation and of adducing evidence, if any, in respect of such information and consider any such representation and evidence and pass such orders as he deems fit".

From the above provisions it is clear that the opportunity contemplated in section 9 (2) (*b*) of the Ceiling Act is only in respect of cases where the party does not furnish any information under section 8 of the Act. Admittedly the petitioner has furnished information and a statement was prepared on the basis of the return filed by him under section 8 (1) of the Ceiling Act. Hence the argument of Mr. Ratnam that the failure to give opportunity to the petitioner to make his representation, under section 9 (2) (*b*) of the Ceiling Act is fatal to the case, cannot be appreciated, inasmuch as the draft statement was published on the basis of the return furnished by the petitioner under section 8 (1) of the Ceiling Act. In such cases, I am of the view, the provision in section 9 (2) (*b*) of the Ceiling Act need not be invoked.

8. The next contention of the petitioner, which assumes importance, is with regard to the 44.70 acres of lands. These lands, according to the petitioner, were minor inam lands and a ryotwari patta was granted therefor under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, XXX of 1963. The petitioner opposes the inclusion of these lands in his holding on the ground that they will neither come under the definition "to hold" nor under the defintion "full owner" contemplated in the Act. If these lands are excluded from his holding, the petitioner will not be affected by the Act and there is no need for him to surrender any land.

9. Admittedly, the abovesaid lands originally were granted as an inam for rendering service, called the *"sthanikam* and *archaka* service". By virtue of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, XXX of 1963, a ryotwari patta was issued to the landowner in this private capacity with a condition of rendering service. As per section 6 (17) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, the items of land included under section 5 of the Act (Ceiling Act) in the draft statement constitute 'religious endowment' to the temple concerned, and the petitioner can hold and enjoy those lands only so long as he renders the prescribed services.

10. Section 50 of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, XXX of 1963 reads as follows:

"(1) Notwithstanding anything contained in the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961) but subject to the provisions of sub-section (2) the authorised officer shall in the fixation of the ceiling area of any person under that Act exclude any inam land.

(2) As soon as may be after the ryotwari settlement is brought into force in any land referred to in sub-section (1) and after the grant of the ryotwari patta in respect of such land to any person in accordance with the provisions of this Act, the authorised officer shall calculate or recalculate the ceiling area of such person and in so calculating or recalculating the authorised officer shall take into account the extent of the land in respect of which a ryotwari patta has been granted to such person under this Act.

(3) For the purposes of the Madras Land Reforms (Fixation of Ceiling on Land)

Act, 1961 (Madras Act LVIII of 1961) any ryotwari patta granted under this Act shall be deemed to have taken effect on the 6th day of April, 1960 and for the purposes of calculating the standard acre under that Act "land revenue" shall in respect of the land referred to in sub-section (1) means the ryotwari assessment payable in pursuance of the ryotwari settlement referred to in sub-section (2)".

From the provision in section 50 (2), stated above, it is clear that after the grant of ryotwari patta to any person in accordance with the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, LVIII of 1961, the authorised officer shall calculate or recalculate the ceiling area to such person and in so calculating or recalculating the authorized officer shall take into account the extent of the land in respect of which a ryotwari patta has been granted to such person under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, XXX of 1963. Relying on the provision, the learned additional Government Pleader contended that the Authorities below have correctly included the 44 70 acres in the holding of the petitioner.

11. Section 50 (2), aforesaid, no doubt states that the Authorised Officer shall take into account the extent of lands for which a ryotwari patta has been granted, in calculating the ceiling area. But, in my view, if such lands are taken into consideration for fixing the ceiling such act of the authority concerned must be in conformity with the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. Section 5 of the Ceiling Act deals with fixation of ceiling on land holdings. In that section it has been specifically stated that the land "held" by a member has to be taken into account. Section 7 of the Ceiling Act states:—

> "On and from the date of commencemnt of this Act no person shall, except as otherwise provided in this Act, but subject to the provisions of Chapter VIII, be entitled to hold land in excess of the ceiling area......"

Section 3 (19) of the Ceiling Act states:—

> "'To hold land' with its grammatical variations and cognate expressions means to own land as owner or to possess or enjoy land as possessory mortgagee or as in one or more of those capacities".

Section 3 (25) of the Ceiling Act reads:—

> "'Landowner' means the owner of the land let for cultivation by a tenant and includes the heirs, assignees, legal representatives of such owner or persons deriving rights through him"

Section 3 (33) of the Ceiling Act states:—

> "owner"—
>
> (*a*) means—
>
> (*i*) any person holding land in severalty or jointly or in common under a ryotwari settlement or in any way subject to the payment of revenue direct to the Government; or
>
> (*ii*) a landholder as defined in the Madras Estates Land Act, 1908 (Madras Act I of 1908), or a ryot as defined in that Act, or
>
> (*iii*) as inamdar not being a landholder defined as aforesaid; and.
>
> (*b*) includes—
>
> (*i*) full owner or limited owner, or
>
> (*ii*) the lessee of any lease-hold village or his heirs, assignees, legal representatives or persons deriving rights through him."

Section 3 (16) of the Ceiling Act reads:—

> "'full owner' means a person entitled to the absolute proprietorship of lands".

Section 3 (28) of the Ceiling Act states:—

> "'limited owner' means any person entitled to a life estate in any land and includes persons deriving rights through him.
>
> *Explanation*.—A person who has a right to enjoy the land during his lifetime shall be deemed to be a limited owner notwithstanding that he has no power to alienate the land".

Section 3 (21) of the Ceiling Act states:—

> "'intermediary' means any person who, not being an owner or a possessory mortgagee,

has an interest in land, and is entitled, by reason of such interest, to possession thereof, but has transferred such possession to others".

12. Mr. Ratnam the learned counsel for the petitioner, submitted that the petitioner is neither the owner of the lands in question, nor a possessory mortgagee, nor a tenant, nor an intermediary so as to come under the definition "to hold" under section 3 (19) of the Ceiling Act. It is only for the service he has to render, the petitioner has been granted ryotwari patta in respect of the lands in question, and once the service is not continued or not performed, the Hindu Religious and Charitable Endowments Board has power to resume the lands in question.

Section 8 (2) of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, XXX of 1963 reads as follows:—

> "Notwithstanding anything contained in sub-section (1), in the Madras Hindu Religious and Charitable Endowments Act, 1959 (Madras Act XXII of 1959), and in the Madras (Transferred Territory) Incorporated and Unincorporated Devaswoms Act, 1959 (Madras Act XXX of 1959) the following provisions shall apply in the case of lands in an iruwaram minor inam granted for the support or maintenance of a religious institution or for the performance of a charity or service connected therewith or of any other religious charity—
>
> ....
>
> (*ii*) in the case of any other land, the institution or the individual rendering service shall, with effect on and from the appointed day, be entitled to a ryotwari patta in respect of that land".

Section 8 (5) reads as follows:—

> "In the case of a minor inam held immediately before the appointed day by an individual on condition of rendering service to a religious, educational or charitable institution, the grant of ryotwari patta under sub-section (1) or (2) shall be subject to the provisions of section 21".

Section 21 (7) of Act XXX of 1963 reads as follows:—

> "(*a*) For so long as the service-holder renders the service, he shall be entitled to occupy permanently the lands in respect of which he is entitled to a patta under section 8, subject, however, to the payment of the assessment fixed under section 16 or under section 16-A as the case may be in respect of such lands.
>
> (*b*) If the service-holder fails to render the service, the prescribed officer shall, after such inquiry and after such notice to the service-holder may be prescribed in this behalf, notify such failure in such manner as may be prescribed. He shall then declare that the service-holder's right to occupy permanently the land under clause (*a*) shall cease and determine, and the institution shall be at liberty to make such arrangement as it thinks fit for the performance of the service and shall be entitled to hold the land as its absolute property subject, however, to the payment of the assessment fixed therefor under section 16 or under section 16-A as the case may be.
>
> *Explanation I*.—For the purposes of this section,—
>
> (*i*) service-holder includes his heirs;
>
> (*ii*) non-performance of the service due to illness or other temporary disability shall not be deemed to be failure to render service, provided that the service-holder makes alternative arrangement for rendering the service during the period of such illness or of other temporary disability.
>
> *Explanation II*.—For the purposes of sub-section (4) "land revenue" means the ryotwari assessment including the additional assessment, water-cess and additional water-cess".

From the abovesaid provisions, it is clear that if the service-holder fails to render the service, the institution shall be at liberty to make such arrangement as it thinks fit for the purposes of service and shall be entitled to hold the land as its absolute property.

13. On the basis of the above statutory provisions it was contended that service inam lands in respect of which a ryotwari *patta* has been granted, cannot be taken into account in calculating the ceiling area under the Ceiling Act.

14. Mr. Ratnam has cited certain decisions to fortify his contentions. The first of such decisions is the one reported in *Radhaswami Charitable Society* v. *Authorized Officer Land Reforms*[1], wherein Ramanujam, J., has held:—

> "The intention of the Legislature in defining "limited owner" is to take in only such persons who held lands with powers of alienation, etc., for a duration of their life and not any life interest, whatever be its character".

It is true, the will gives a right of alienation, but such right of alienation is only limited to the disposal of the property for discharging the debt referred to in the will. Such a limited power of alienation falls short of a full estate, and she had no power to deal with the corpus of the estate except to the limited extent indicated above. Subject to the right of the testator's widow to enjoy the property during his lifetime, the property has vested in favour of the Society even on the death of the testator. *Radhaswami Charitable Society* v. *Authorised Officer, Land Reforms*[1], and it has become the owner of the property, subject to the rights of enjoyment, etc., granted in favour of the testator's widow. The directions given by the testator under the will in this case attracted the principle of the decision in *Lakshmana* v. *Rama Iyer*[2], and therefore, it has to be held that the interest conferred (on) the testator's widow, is more like a limited estate known to English law than like a widow's estate's known to Hindu Law.

15. It has therefore, to be held in this case that the widow of the testator who is entitled only to a right of enjoyment over the income of the properties and not entitled to any portion of the corpus, which stands vested with the society as on the date of death of the testator, is not a limited owner as defined in the Act, and as such she cannot be held to be a person "holding" the land in question as contemplated in the definition of to "hold".

1. (1971) 84 L.W. 379: (1971) 2 M.L.J. 35: A.I.R. 1971 Mad. 458.

2. 1953 S.C.J. 420 : 1953 S.C.R. 848 : (1953) 1 M.L.J. 834 : A.I.R. 1953 S.C. 304.

The next decision cited by Mr. Ratnam is the one reported in *Anjaneyalu* v. *Sri Venugopala Rice Mills Ltd.*[1], which was decided by a Full Bench of our High Court. Schwabe, C.J., has observed in that decision as follows:—

> "In my judgment the sale of such property is opposed to the nature of the interest affected and also is contrary to public policy. The right to enjoy the property is as long as the inamdar renders services in the performance of which the public have an interest. If the inamdar sold the property it is obvious that he would in all probability no longer perform the services; and further, it is quite opposed to the nature of his interest and duty (namely, that he should enjoy the produce of the land as salary for the public services he has to render) that he should sell it or alienate it, leaving himself without the means subsistence and without further interest in the place or in the performance of the services. It is also to be observed that if the property were sold in *Anjaneyalu* v. *Sri Venugopala Rice Mills Ltd.*[1], the purchaser would get no title of any value, for at any moment the property might revert to the inamdar or the Government, as the case may be, when the inamdar ceases to render such services. Further, under Order 56 (1) of the Standing Orders of the Board of Revenue the Government can resume possession of a charitable or religious inam immediately on alienation".

16. The next decision cited by the learned counsel is the one reported in *Ramanathan Chettiar* v. *Kalidasan Kavandan*[2], wherein Venkataramana Rao, J., has stated:—

> "A mortgage of a temple service inam land is invalid as opposed to public policy, at any rate where the mortgage does not provide for "payment to the institution or in support of the service a sum not less than the net assessment of the land" as contemplated by Standing Order No. 54 clause (2) of the Board of Revenue".

1. (1922) I. L. R. 45 Mad. 620 : 15 L.W. 513 : 42 M.L.J. 477 ; A.I.R. 1922 Mad. 197.

2. (1936) 71 M.L.J. 398.

In the decision reported in *Masumayya* v. *Official Receiver, Kurnool*[1], a Division Bench of our High Court has stated thus:—

> "The learned Judges also in *Anjaneyalu* v. *Sri Venugopala Rice Mills Ltd.*[2], have indicated their view that if the lands are alienated the interest of the holder, and of those for whom he should perform the service will be prejudiced. It seems to follow from this that if the lands are to go out of the control of an official such as the Official Receiver—in this case it must be remembered that the Official Receiver is a Hindu while the insolvent is a Mahomedan—the performance of the services must obviously be in peril. The whole trend of the authority is that these lands not only cannot be alienated, but cannot be transferred from the holder to an official such as the Official Receiver".

In the decision reported in *Gopal Naidu* v. *Special Tahsildar for Land Acquisition N. P., Madurai*[3], a Bench of our High Court considering a grant of land for *paricharakam* service, the conclusiveness or otherwise of an admission by the inamdar describing himself as melwaramdar and the alienability of the land, held: "The second claimant, appellant in App. No. 769 of 1967 is the alienee of both melwaram and kudiwaram regarding a portion of the acquired property. It is on that basis that he claims a portion of the compensation. The inam was personal and was inalienable as it was granted for the performance of *paricharakam* service. The Court below failed to consider the contention urged on behalf of the Devasthanam that the grant being personal for the performance of *paricharakam* service in the temple, it was inalienable and that the alienee does not get any title. That a personal service inam is inalienable is well settled. In *Anjaneyalu* v. *Venugopala Rice Mills Ltd.*[2], it was held that a personal inam for public service is not a property that is liable to attachment under section 60, Civil Procedure Code. It is pointed out that where the land is personal inam for public service, under section 6 (*h*) of the Transfer of Property Act, it is opposed to public policy and the transfer cannot convey any title. In *Ramakrishamma* v. *Venkatasubbiah*[1], it was held that the land burdened with the performance of a service of a public nature is inalienable being opposed to public policy and that Dasabandam inams being burdened with a service of a public nature are inalienable and cannot be sold in execution of a decree against the inamdar. In *Masumayya* v. *Official Receiver, Kurnool*[2], the question arose whether, on the adjudication of the holder of a certain inam as an insolvent, the inam land would vest in the Official Receiver. The question was answered in the negative, holding that such land not only could not be alienated, but could not be transferred from the holder to the Official Receiver. In *Ramanathan Chettiar* v. *Kalidasa Kavandam*[1], it was held that the mortgage of a temple service therefore, invalid. The counsel appearing for the second claimant, who claims to have acquired title as an alienee from the descendants of the original grantee, has no valid title to the acquired property and is, therefore, not entitled to claim a share in the compensation.

17. An extent of 44.70 acres of land included by the authorities below in the holding of the petitioner were minor inam lands and a ryotwari patta was granted to the petitioner under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, XXX of 1963. The petitioner opposed the inclusion of these lands in his holding on the ground that he can enjoy the lands only so long as he continues to render services of *sthanikam* and *archaka*. Even though patta has been granted in the name of the petitioner, he has not paid the compensation specified in the Act to enable him to become the absolute owner of the lands. Therefore, the petitioner prays that these lands cannot be included in his holding and the ceiling area calculated. The decisions referred to above

1. (1942) 2 M.L.J. 504 : 55 L.W. 640 : I.L.R. (1943) Mad. 349 : A.I.R. 1943 Mad. 72.
2. I.L.R. (1922) 45 Mad. 620 : 15 L.W. 513 : 42 M.L.J. 477 : A.I.R. 1922 Mad. 197.
3. (1974) 87 L.W. 67.

1. (1934) 40 L.W. 918 : 68 M.L.J. 46 : I.L.R. 58 Mad 389 : A.I.R. 1935 Mad. 252.
2. 55 L.W. 640 I.L.R. (1943) Mad. 349 : (1942) M.L.J. 504 : A.I.R. 1943 Mad 72.
3. (1936) 71 M.L.J. 398 : 44 L.W. 505: A.I.R, 1936 Mad. 559.

clearly establish the inalienable nature of inam lands granted for rendering service. Admittedly the lands measuring 44.70 acres are service inam lands, even though patta has been granted in favour of the petitioner herein. Inasmuch as these 44.70 acres of lands are inalienable, they cannot be considered as lands of a person who is entitled "to hold" the same as provided in section 7 of the Ceiling Act. The lands of this nature held by a person cannot come under the definition of section 5 (19) of the Ceiling Act, since he, who is holding such service lands, can be considered neither the owner, nor a possessory mortgagee nor a tenant, nor an intermediary. The definition of 'owner' in section 3 (33) of the Ceiling Act will not also apply to a person who holds such service inam lands. The decisions referred to above support this view *in toto*, and as such the inclusion of 44.70 acres of land for the purpose of calculating the ceiling area of the petitioner's holding, is not correct.

18. In these circumstances, the revision is allowed holding that the 44.70 acres of land enjoyed by the petitioner as service-holder, should not be taken into account for the purpose of fixing the ceiling area of the petitioner's holding. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Nainar Sundaram, JJ.*

The United India Fire and General Insurance Company Limited—Unit Madras Motor and General Insurance Company, Madras-14 .. *Appellant**

v.

The Union of India owning the Southern Railway by its General Manager, Madras-3 and others .. *Respondents*.

Motor Vehicles Act (IV of 1939), section 95 (prior to amendment by Central Act LVI of 1969), sections 94 and 96—Scope—Plaintiff's tractor on its way transporting rails—First defendant's lorry coming in opposite direction, in overtaking a bus, dashing against the tractor—Damage to tractor — Negligence of driver (second defendant) found—Suit for damages against lorry owner, driver and insurance company—Insurance company held not liable.

On 21st December, 1967, the plaintiff's tractor with trailer attached was on its way transporting rails. A lorry belonging to the first defendant and driven by the second defendant coming in the opposite direction in overtaking a bus dashed against the tractor causing heavy damage. A suit was brought for recovery of damages against the first and second defendants as well as against the insurance company. Negligence on the part of the lorry driver was found to be responsible for the accident. The suit was decreed as prayed for. In the appeal therefrom to the High Court by the insurance company, it was contended that at the relevant time (21st December, 1967) when the accident occurred, section 95 (1) (*b*) of the Motor Vehicles Act did not cover the liability for damage to any property of a third party, that the Act contemplated only the liability for the personal injuries of a third party, and therefore, in the present case, the damages claimed being with reference to the damage sustained by

* Appeal No. 658 of 1974. *5th July*, 1978.

the plaintiff's tractor and that not being covered by section 95 (1) (*b*) as it then stood the liability in this behalf is not statutory but only contractual; and with reference to such contractual liability there being no privity of contract between the insurance company and the plaintiff with reference to the policy of insurance taken by the first defendant, the insurance company was not liable. The actual policy in the present case issued by the insuance company had however, under the Head 'Liability to Third Parties' covered both the personal and property liability of third parties the former being relatable to section 95 (1) (*b*) and the latter being a contractual liability. On behalf of the plaintiff-respondent it was argued that view of section 96, even in respect of a non-statutory contractual liability, the insurer can be made liable in the present suit itself.

Held: There is a distinction between the statutory liability as imposed by section 95 of the Motor Vehicles Act and the contractual liability as imposed by the policy of insurance as entered into between the first defendant (lorry owner) and the appellant (the insurance company). Sections 94, 95 (as it stood prior to its amendment by Central Act LVI of 1969) and section 96 of the Motor Vehicles Act read together show that (1) No person can use a motor vehicle in a public place unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be a policy of insurance. (2) Such a policy must satisfy certain conditions; one of the conditions being the liability to be covered by the policy, and the liability so far as the present case is concerned on the relevant date was the liability which may be incurred by the insured in respect of the death of or bodily injury to any person arising out of the use of the vehicle in a public place. (3) In respect of this liability, the insurer has been called upon to indemnify the insured. (4) Section 96 is procedural in character, and provides for the working out of such indemnity by entitling the insurer to notice in the proceedings taken out by the affected party against the insured and enabling the insurer to put forward certain specified defences. (5) Once a decree has been passed after such notice, the insurer will have to satisfy the decree subject to the extent of financial liability undertaken by him under the insurance policy. [*Para*. 13.]

The position of the insurer is that no decree can be passed against him in the proceedings initiated by the injured for the recovery of compensation against the insured, and this is made clear by section 96 (1) itself, where it talks of a judgment being obtained against any person insured by the policy and the insurer paying to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder as if he were the judgment-debtor. Once the statute uses the expression "as if he were the judgment-debtor", it is clear that really he is not the judgment-debtor. That means, no decree could be passed and is passed against the insurer. Notwithstanding the fact that no such decree is passed against the judgment-debtor, still in view of the obligation imposed on the insurer under sections 95 (5), 96 (1) obliges him to pay to the person who was entitled to the benefit of the decree, by way of indemnification of the insured who is the actual decree-holder, any sum not exceeding the sum assured payable under the policy.

[*Para*. 14.]

Section 96 does not purport to extend or enlarge the liability of the insurer, having defined or limited the suit liability under section 95 (1). On the other hand, it expressly refers to "liability as is required to be covered by a policy under clause (*b*) of sub-section (1) of section 95" and thus deals only with the liability covered by section 95 (1) (*b*). Section 96 is merely procedural in character for the purpose of working out the obligation imposed on the insurer that he should indemnity the insured in respect of the statutory liability covered by the insurance policy in terms of section 95 (5). It is not as if section 96 is an amendment to the Code of Civil Procedure, providing for a general procedure. Even in respect of the statutory liability as contemplated by section 95 (1) it is open to the insurer from a procedural point of view to put forward the contentions that there is no privity of contract of the policy of insurance against the insurer and the insured, and therefore the injured cannot institute a suit on the contract of policy of insurance against the insurer, and the insurer

will be justified in putting forward the contention. [*Para.* 15.]

In order to see that an injured is not driven to file a separate suit against the insurer, provision has been made in section 96 (1) and section 96 (2) for the purpose of implementing the indemnity provided for in section 95 (5). Sub-sections (1) and (2) of section 96 do not go beyond that. But for section 96, even with regard to the statutory liability, it will be open to the insurer to put forward the contention that the injured cannot make the insurer party to the proceedings even for the purpose of ultimately working out the benefits of the decree which the injured may obtain against the owner *viz.*, the insured. But for section 96, the position would be that the injured will have to work out his remedies against the owner of the vehicle, who in turn will enforce the policy against the insurer. [*Para.* 15.]

Case referred to:—

Bova Chinna Mallamma v. *The Hindusthan Ideal Insurance Company Limited,* I.L.R. (1970) A.P. 1097.

Appeal against the decree dated 30th March, 1974 of the Additional Subordinate Judge, Vellore in Original Suit No. 140 of 1969.

This Appeal coming on for hearing on Monday, the 3rd of July, 1978, Tuesday, the 4th day of July, 1978 and this day, the Court delivered the following judgment:

K. C. Srinivasan, for Appellant.

P. S. Srisailam, for Respondent.

The Judgment of the Court was delivered by

Ismail, J.—The third defendant in O.S. No. 140 of 1969 on the file of the Court of the Subordinate Judge, Vellore is the appellant herein. The first respondent, *viz.*, Union of India owning the Southern Railway by its General Manager, Park Town, Madras-3, instituted the suit for recovery of a sum of Rs. 18,323-19 being the damages incurred under the following circumstances: The Southern Railway owned one tractor with attached trailer bearing registration mark MYD 8748. It was the product of Ashok Leyland and was bought for Rs. 72,000. In 1967, the Railway was laying a railway line between Salem and Bangalore. This tractor was used in the project for transporting rails: On 21st December, 1967, the tractor was on its way to Chandapur with a load of 25 rails. While so, one Deccan Express Bus came in the opposite direction. The allegation of the first respondent plaintiff in the plaint was that the lorry bearing registration mark MDJ 3588, which was owned by the first defendant (2nd respondent) and was driven by the second defendant (3rd respondent) overtook the Deccan Express Bus, and in so doing, dashed against the tractor and thereby caused heavy damage. This accident, according to the plaintiff (1st respondent), was the result of the rash and negligent driving of the lorry by the second defendant. The second defendant was taken into custody and was prosecuted for rash and negligent driving. He was convicted. As the tractor could not be driven because of the heavy damage it sustained, it was towed to Messrs Sundaram Motors Private Limited, Bangalore, who were the authorised dealers and engineers for tractors such as the one owned by the plaintiff-first respondent, and it was repaired at a cost of Rs. 18,323-19. The plaintiff-first respondent further stated that the first defendant's lorry was insured with the appellant.

2. In the written statement filed by him, the first defendant admitted that he was the owner of lorry bearing registration mark MDJ 3588 and that at the time of the accident, it was driven by his driver, the second defendant. He, however, disputed his liability to pay any damages as claimed in the plaint, because at the time of the accident, the lorry was driven at a moderate speed. The Deccan Express Bus, which was running in front of it suddenly stopped with the result that the second defendant had to swerve the lorry to the right with a view to avoiding collision. After it was stopped by applying the brakes, the plaintiff's tractor ran and collided with the lorry. The damage, according to the first defendant, was very light, and the repairs could have been effected by expending a sum of Rs. 250 only.

3. The appellant, in his separate written statement, contended that there is no privity of contract between the plaintiff-first respondent on the one hand and the appellant herein

on the other, that there was no statutory liability, that the driver of the first respondent-plaintiff was guilty of contributory negligence and that the plaintiff's claim was exaggerated and had no basis. The appellant also contended that the suit was barred by time.

4. The second defendant, who appeared in person, made an endorsement on the back of the plaint stating that he had no objection for a decree being passed against him.

5. On these pleadings, the following issues were framed for trial:

1. Whether MDJ 3588 was driven rashly and negligently and dashed against the plaintiff's tractor—trailer causing damages as alleged?

2. Did plaintiff's vehicle collide with the lorry MDJ 3588 when it was allegedly stationary at the extreme right of the road as alleged by the 1st defendant?

3. Deleted.

4. Deleted.

5. Was the plaintiff's driver guilty of contributory negligence as pleaded by 3rd defendant?

6. Which of the defendants are liable and to what sum in damages to the plaintiff?

7. Is the suit barred by limitation?

8. Whether there is no cause of action against 3rd defendant?

9. What is the extent of the damage sustained to the plaintiff's vehicle and what are the expenses necessary to repair it?

10. Deleted.
11. Deleted.
12. Deleted.
13. Deleted.
14. Deleted.
15. Deleted.

16. Whether the suit is maintainable without details of claim for Rs. 18,323-19 being given?

17. To what relief, is the plaintiff entitled?

6. By his judgment and decree dated 30th March, 1974, the learned Additional Subordinate Judge, Vellore, held that the accident took place as a result of the rash and negligent driving of the first defendant's lorry by the second defendant, and, therefore, the first defendant was liable. He also held that the expenses of Rs. 18,323-19 incurred by the first respondent for repairing the tractor has been proved. He further held that there was no evidence to show that there was any contributory negligence on the part of the driver of the tractor. He negatived the contention of the appellant herein that because of want of privity of contract, he would not be liable to pay damages to the first respondent herein. In the result, the suit was decreed as prayed for. It is against this judgment and decree that the third defendant in the suit, *viz.*, the Insurance Company, has filed the present appeal. Thus, the decree against the defendants 1 and 2 has become final.

7. Mr. K. C. Srinivasan, the learned counsel for the appellant, addressed only two arguments. One was there was no negligence on the part of the second defendant (third respondent), *viz.*, the driver of the lorry owned by the first defendant (second respondent). The second was that no decree can be passed against the appellant since there was no privity of contract between the plaintiff-first respondent and the appellant with reference to the policy of insurance taken by the first defendant-second respondent with the appellant herein.

8. As far as the first point is concerned, that need not detain us. The second defendant, the driver of the lorry, as we have pointed out already, appeared in person and made an endorsement on the back of the plaint to the effect that he has no objection to the decree being passed against him. Secondly, the said second defendant was not examined to show that he was not rash and negligent in driving the lorry. Thirdly, the second defendant was prosecuted and convicted for rash and negligent driving. Fourthly, the location of the vehicles immediately after the occurrence of the accident clearly established that the accident should have happened only because of the rash and negligent driving of the second defendant. In view of the clinching circumstances establishing the rash and negligent driving on the part of the second defendant, the learned counsel for the appellant himself

did not seriously pursue the first point, with the result we confirm the conclusion of the learned Subordinate Judge that the accident was the result of rashness and negligence on the part of the second defendant in driving the lorry of the first defendant.

9. That takes us to the second point, *viz.*, that there being no privity of contract between the plaintiff and the Insurance Company, could the Insurance Company be made liable by passing a decree against it in a suit instituted by the plaintiff for recovery of damages? It may be pointed out that the decision of the learned Judge on this point does not appear to be very clear. He had not borne in mind the distinction between the statutory liability as imposed by section 95 of the Motor Vehicles Act, 1939, and the contractual liability as imposed by the policy of insurance entered into between the first defendant and the appellant herein. The learned counsel for the appellant contended that at the relevant time, the statute had contemplated there being a policy of insurance covering only the liability for the personal injuries of a third party, and not the liability for damages caused to the property of a third party, and, therefore, in the present case, the damages claimed being with reference to the damage suffered by a tractor belonging to the first respondent-plaintiff and that not being covered by section 95 (1) (*b*) of the Motor Vehicles Act, the liability in this behalf is not statutory, but only contractual, and with reference to such a contractual liability there is no privity of contract between the appellant and the plaintiff-first respondent. In support of this contention, he also relied on a decision of Mohan, J., dated 25th April, 1977 in A.S. No. 5 of 1973 (*M|s. Sri A. Ramamoorthy and another* v. *S. Ganapathy Nadar and another*), which fully supports his contention.

10. As far as the statutory provisions are concerned, Chapter VIII of the Motor Vehicles Act, 1939, deals with the insurance of motor vehicles against third party risks. Section 95, in so far as it is relevant, as it stood prior to its amendment by Central Act LVI of 1969, stated as follows:

> "95. (1) In order to comply with the requirements of this Chapter, a policy of Insurance must be a policy which—
>
> * * * * * *
>
> (*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2).
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person."

Only by the amendment of the year 1969, after the words "any person", the following words were added:

> "or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place."

Thus, on 21st December, 1967, when the accident occurred in the present case, section 95 (1) (*b*) of the Act did not cover the liability for damage to any property of a third party caused by or arising out of the use of the vehicle in a public place and it covered only a liability which may be incurred by the insurer in respect of the death of or bodily injury to any person. In the present case, the damage being to the tractor of the plaintiff-first respondent, the liability with reference thereto was not covered by section 95 (1) (*b*) at the relevant time. It is only on this basis the learned counsel contended that the statute itself not imposing any such liability, the plaintiff-first respondent cannot claim a decree against the appellant in this behalf. It is this view that was upheld by Mohan, J., in the judgment referred to above.

11. However, in the present case, the actual policy issued by the appellant herein (marked as Exhibit B-7) clearly covers both the personal and property liability in respect of third parties. The policy states:

> "*Section II—Liability to third parties.*
>
> 1. Subject to the Limits of Liability the Company will, indemnify the insured against all sums including claimant's cost and expenses which the Insured shall become legally liable to pay in respect of—
>
> (*i*) death of or bodily injury to any person caused by or arising out of the use (including the loading and|or unloading) of the Motor Vehicle."

(ii) damage to property caused by the use (including the loading and|or unloading) of the Motor Vehicle."

However, the liability shown as 1 (i) in section II will be a statutory liability with reference to section 95 (1) (b) and the liability shown as 1 (ii) in section II will be a contractual liability. The question that arises for consideration is, will the considerations which apply to the statutory liability covered by 1 (i) in section II apply to the contractual liability covered by 1 (ii) in section II?

12. The learned counsel for the plaintiff-first respondent very strenuously contended that in view of the provisions contained in section 96 of the Act, even in respect of a contractual liability, the insurer can be made liable in this suit itself. For the purpose of understanding the arguments, it is necessary to refer to one or two statutory provisions. Section 94 of the Act provides for the necessity for insurance against third party risk. Section 94 (1) of the Act states:

> "94. (1) No person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter."

Having thus provided for the necessity for insurance, section 95 deals with the requirements of policies and limits of liability. As we have pointed out already, on the date when the accident took place, *i.e.*, on 21st December, 1967, section 95 (1) (b) (i) provided for a liability which may be incurred by an insurer in respect of the death of or bodily injury to any person, and did not actually provide for the liability in respect of the damage to any property of a third party. It is against the background of sections 94 and 95, we shall have to consider the scope of section 96.

13. Before actually referring to the provisions contained in section 96, it is necessary to refer to sub-section (4) and sub-section (5) of section 95 itself. Sub-section (4) of section 95 provides:

> "(4) A policy shall be of no effect for the purposes of this chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any conditions subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases".

Sub-section (5) reads:

> "(5) Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of person".

Thus, sections 94 and 95 provide for the necessity for taking out a policy and the requirements of such policy and the liability that should be covered by the policy, and also impose an obligation on the insurer to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons. It is against the backgound of this position we shall have now to see what section 96 provides.

Sub-section (1) of section 96 states:

> "96 (1). If, after a certificate of insurance has been issued under sub-section (4) of section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments".

Sub-section (2) of section 96, so far as is relevant for the purpose of this case, reads:

> "(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so stayed thereon pending an appeal and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto......".

Having made such a provision, sub-section (2) enables the insurer so made a party to defend the action on the grounds enumerated in the sub-section. Thus, if we read sections 94, 95 and 96 together, the consequences are:—(1) No person can use a motor vehicle in a public place unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance. (2) Such a policy must satisfy certain conditions, one of the conditions being the liability to be covered by the policy, and the liability so far as the present case is concerned on the relevant date was the liability which may be incurred by the insured in respect of the death of or bodily injury to any person arising out of the use of the vehicle in a public place. (3) In respect of this liability, the insurer has been called upon to indemnify the insured. (4) Section 96 is procedural in character, and provides for the working out of such indemnity by entitling the insurer to notice in the proceedings taken out by the affected party against the insured and enabling the insurer to put forward certain specified defences. (5) Once a decree has been passed after such notice, the insurer will have to satisfy the decree subject to the extent of financial liability undertaken by him under the insurance policy.

14. In our opinion the position of the insurer is made clear, *viz.*, that no decree can be passed against such insurer in the proceedings initiated by the injured for the recovery of compensation against the insurer, and this is made abundantly clear by section 96 (1) itself, where it talks of a judgment being obtained against any person insured by the policy and the insurer paying to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder as if he were the judgment-debtor. Once the statute uses the exprssion "as if he were the judgment-debtor", it is clear that really he is not the judgment-debtor. That means, no decree could be passed, and is passed against the insurer. Notwithstanding the fact that no such decree is passed against the insurer, and, therefore, the insurer is not a judgment-debtor, still in view of the obligation imposed on the insurer under section 95 (5), section 96 (1) obliges him to pay to the person who was entitled to the benefit of the decree, by way of indemnification of the insured, who is the actual decree-holder, any sum not exceeding the sum assured payable under the policy.

15. However, the argument of Mr. Srisailam, the learned counsel for the first respondent-plaintiff is that section 96 (1) is not subject to the limitations of section 95 (1). According to the learned counsel, section 96 (1) applies not merely to the statutory liability provided for in section 95 (1), but it applies even to contractual liability. We are unable to appreciate this argument. Section 96 does not purport to extend or enlarge the liability of the insurer, having defined or limited the said liability under section 95 (1). On the other hand, it expressly refers to "liability as is required to be covered by a policy under clause (*b*) of sub-section (1) of section 95", and thus deals only with the liability covered by section 95 (1) (*b*). As we have pointed out already, section 96 is merely procedural in character for the purpose of working out the obligation imposed on the insurer that he should indemnify the insured in respect of the statutory liability covered by the insurance policy in terms of section 95 (5). It is not as if section 96 is an amendment to the Code of Civil Procedure, providing for a general procedure. Even in respect of the statutory liability as contemplated by section 95 (1), it is open to an insurer from a procedural point of view to put forward the contention that there is no privity of contract between the injured and the insurer, and, therefore, the injured cannot institute a suit on the contract of the policy of insurance against the insurer, and the insurer will be justified in putting

forward that contention. In order to see that an injured is not driven to file a separate suit against the insurer after having first obtained a decree against the insured, provision has been made in sections 96 (1) and 96 (2) for the purpose of implementing the indemnity provided for in section 95 (5). Sub-sections (1) and (2) of section 96 do not go beyond this. But for section 96, even with regard to the statutory liability, it will be open to the insurer to put forward the contention that the injured cannot make the insurer a party to the proceedings even for the purpose of ultimately working out the benefits of the decree which the injured may obtain against the other, *viz.*, the insured. But for section 96, the position would be that the injured will have to work out his remedies against the owner of vehicle, who in turn will enforce the policy against the insurer. That being the result of the legal position as well as the statutory provisions, we are unable to appreciate the argument of the learned counsel for the first respondent-plaintiff that the first respondent-plaintiff was entitled to obtain a decree against the insurance company.

16. This position can be usefully contrasted with the position resulting from the change of the law in constituting Claims Tribunals for adjudicating such claims. Section 110-B of the Act provides:

> "110-B. On receipt of an application for compensation made under section 110-A, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an enquiry into the claim and may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be".

Thus, it will be clear that this section enables the Tribunal to specify the amount of compensation to be paid by the insurer which is incomplete contrast with the position which we have explained above before the relevant amendments were introduced into the Act.

Mr. Srisailam very strongly relied on a judgment of the High Court of Andhra Pradesh in *Bova Chinna Mallamma* v. *The Hindustan Ideal Insurance Company Limited, Esplanade, Madras-I*[1], in support of his contention that because of section 96, even non-statutory contractual liability can be enforced against the insurer directly in a suit filed by a person like the first respondent-plaintiff. In that case, the suit was filed for recovery of damages of Rs. 3,000 sustained by a person as a result of negligence by the driver of the motor vehicle. The owner of the vehicle was impleaded as the first defendant, the insurance company was impleaded as the second defendant. The defence of the insurance company was that the suit against it should be dismissed as there was no privity of contract between the plaintiff and the Insurance Company. The trial Court held that the plaintiff had no cause of action against the Insurance Company and that no relief could be given against the said company, but observed:

> "He (plaintiff) can only obtain a decree against the insured and execute the same against the 2nd defendant (Insurance Company) treating it as a judgment-debtor under the terms of section 96 of the Motor Vehicles Act........".

In view of this observation, the suit was dismissed against the Insurance Company. The first defendant alone filed an appeal. All the findings of the trial Court were confirmed, and the appeal was dismissed. The plaintiff herself did not file any appeal as against that part of the decree dismissing the suit against the Insurance Company. However, in the appeal preferred by the first defendant, he contended that there ought to be a decree against the Insurance Company also. But the lower appellate Court held that there being no privity of contract between the plaintiff and the Insurance Company, no decree could be passed against the Insurance Company. A second appeal against that judgment came up for disposal before a Bench of the Andhra Pradesh High Court. The Judgment of the Bench of that High Court itself states:

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1. I.L.R. 1970 A.P. 1097.

"The only point argued before us on behalf of the appellant is that though a decree cannot be passed strightaway against the second defendant alone, the Courts below erred in dismissing the suit against the second defendant".

After referring to some earlier decisions of that Court the Bench stated:

"The principle laid down in these decisions is that there being no privity of contract between the Insurance Company and the third party claiming the damages, no decree can be passed in favour of the claimant as against the Insurance Company. The claimant should in the first instance obtain a decree against the owner of the vehicle and it is only after he is able to get such a decree against the insured (owner of the vehicle) that the said judgment can be enforced against the Insurance Company under the provisions of section 96 (1) of the Motor Vehicles Act as if it were the judgment-debtor. It is only for this reason that it was observed in the said decisions that the suit is not maintainable against the Insurance Company. We do not understand the said decisions as laying down that the Insurance Company is not a proper party to the suit. Even the learned counsel for the appellant has not contended that he should have a decree against the Insurance Company also".

In such a context, it is difficult to appreciate how that decision is of any relevancy to the present case. In the first place, that case dealt with the statutory liability, *viz.*, liability for personal injury to the victim of the accident and did not concern itself with the damage to the property as we have in the present case. Secondly, in that case also, there was no contention put forward on behalf of the appellant before the High Court that she should have a decree against the Insurance Company also. In view of these two circumstances, we are of the opinion that that decision is not of any assistance to the first respondent-plaintiff in the present case. Consequently, we are of the opinion that the judgment of Mohan, J., referred to above, is correct, and this appeal is allowed, and the decree passed by the trial Court against the appellant herein is set aside.

17. We have to record with regret our displeasure at the manner in which the learned counsel for the first respondent-plaintiff persisted in repeating the point which we had told him more than once that we were not accepting. We did not give any opportunity whatever to the learned counsel to gather the impression that we had not understood the point urged by him. Still, the learned counsel took up a considerable time of the Court going on repeating what he said notwithstanding our telling him several times that no purpose whatever would be served by such repetition.

18. The appellant is entitled to its costs from the first respondent-plaintiff.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and G. Ramanujam, J.*

S. R. Rajasekharan .. *Appellant**

v.

R. Nookkandi and others .. *Respondents.*

Tamil Nadu Cinemas (Regulation) Rules (1957), *Rule* 14 (2) *and* (3)—*Grant of no-objection certificate—Exhibition of cinemas—Objection raised by competitor of site being within prohibited distance if measured across Railway line—Objection overruled—Distance to be measured by regular pathway only and not across railway line—Constitution of India* (1950), *Article* 226.

The appellant objected to the grant of a 'no objection certificate' to the first respondent for conducting a cinematographic exhibition after having obtained a 'no objection certificate' under the Tamil Nadu Cinematograph Act. The appellant objected on the ground that the projected cinema was likely to be situate within the prohibited distance thus offending the rule of distance provided for in rule 14 (2) and (3) of the Tamil Nadu Cinemas (Regulation) Rules, 1957. The appellant's writ

*W.A. No. 479 of 1978. *20th September*, 1978.

petition was dismissed on the ground that the rule of distance was not offended. The appellant filed this appeal. According to the appellant, the distance measured across the railway line, would offend the rule of distance under rule 14 (2) and (3).

Held: The shortest pathway referred to in rule 14 (3) would not comprehend a pathway used by the public which would invariably result in trespass over public or private property. As Courts of law, administering law in its strict sense, could not make exception to well-known principles that no one could be licensed or permitted to trespass on other properties, whether public or private, it would be a travesty if the Court held that the distance in this case had to be measured not by the usual general pathway, which would be by going around the station, but by the pathway which the public were using by committing unadulterated trespass on public property. As a matter of fact, the competent authorities had expressed the view that the distance between the existing touring cinema theatre and the proposed touring cinema, if measured along a pathway which was generally used by the public and which did not involve a trespass on railway line, would not offend the rule of distance. [*Para.* 2.]

Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice V. Ramaswami, dated 13th September, 1978 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 3568 of 1978 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the 3rd Respondent in B.P.Rt. 4014 (b), dated 21st August, 1978 and the records of the 2nd Respondent in Roc. No. Cl. 177405 of 1977, dated 23rd June, 1978 and quash the order of the 3rd Respondent, dated 21st August, 1978 confirming the order of the 2nd Respondent, dated 23rd June, 1978.

J. Kanakaraj, for *Raj and Raj*, for Appellant.

The Order of the Court was made by

Ramaprasada Rao, CJ.—The appellant before us in objecting to the grant of a 'no objection certificate' to the first respondent for conducting a cinematographic exhibition after having obtained a 'no objection certificate under the Tamil Nadu Cinematograph Act. The appellant, who is a competitor running a touring cinema objected to the grant of a 'no objection certificate' to the first-respondent, who is an independent touring cinema owner on the ground that that projected is likely to be situate within the prohibited distance thus offending the rule of distance provided for in Rule 14 (2) and (3) of the Tamil Nadu Cinemas (Regulation) Rules, 1957. The second ground of attack is that the first respondent originally gave the survey number of the property in which his touring cinema is to be situate as one number, but later on, it transpires that on a sub-division a different survey number was given to the site on which the cinema is to be located and that, therefore, there is no re-application of the mind by the appropriate authorities in the matter of the suitability of the site. The Collector and the Board, who were the competent authorities under the Act, made the grant in favour of the first respondent. This was challenged by the appellant under Article 226 of the Constitution before V. Ramaswami, J. The learned Judge, after going through the records, held that the rule of distance was not offended and that the licence was granted for the location of the touring cinema on site which was taken on lease by the first respondent and which was localised by the authorities, He, therefore, dismissed the writ petition. As against this, the present writ appeal has been filed.

2. Mr. Kanakaraj, learned counsel for the appellant, strenuously contends that it is common for the people in the locality, for whose benefit and recreational advantage the cinema was licensed, to use always the nearest pathway to the site in question by crossing the railway line and if the distance between the existing touring cinema and the proposed site is taken through the railway line, it would offend the rule of distance under rules 14 (2) and (3) of the above rules. Stress is made on the words "generally used by the members of the public" in rule 34 (3) and it is contended that wherever there is proof that the members of the public were using a pathway, whatever may be the nature of that pathway, it ought to be the pathway which should be

reckoned for purpose of finding out the distance contemplated in rule 14 (3). Reliance is placed upon the inspection report which is extracted in the Collector's order which says:

> "At the time of my inspection, a large number of people had gathered at this site and made a request that they need a cinema nearby their huts for purposes of recreation. There are no habitations near about this site and the audience will have to go across the railway line from the outskirts of the Tuticorin village and some colonies situated on the same side of the railway line."

The inspection report, according to the learned counsel, lends support to his contention that the members of the public were passing through the railway line to reach the site in question and if measured in that direction, the no objection certificate ought not have been granted. There is a fallacy in this contention because, what is contemplated in rule 14 (3) is that the distance between the cinemas in any place or in adjacent places shall be reckoned along the shortest pathway, etc., which is generally used by the members of the public. It cannot be comprehended that the shortest pathway referred to in rule 14 (3) would also include a pathway used by the public which would invariably result in trespass over public or private property. It is not in dispute that if the contention of the learned counsel were to be accepted, we would be first licensing trespass on public property before we can reject the application for no objection certificate of the first respondent. As Courts of law, administering law in its strictest sense, cannot make exception to well-known principles that no one can be licensed or permitted to trespass on others properties, whether public or private, it would be a travesty if we accept the contention and hold that the distance in this case has to be measured not by the usual general pathway, which would be by going around the station, but by the pathway which the public were using by committing unadulterated trespass on public property. It is conceded that the distance between the existing touring cinema and the proposed site if contoured through the railway line would offend the rule of distance but not otherwise. But as Courts cannot bless the action of the public in committing trespass on public property so as to come to the conclusion whether the distance rule is offended or not, we are unable to accept this contention. As a matter of fact, the competent authorities have expressed the view that the distance between the existing touring cinema theatre and the proposed touring cinema, if measured along a pathway which is generally used by the public and which does not involve a trespass on railway line, would not offend the rule of distance. In these circumstances, we are unable to agree with the learned counsel on the first contention. In so far as the second contention is concerned, there is no dispute that the property was subdivided after the application was made by the first respondent for the grant of the no-objection certificate. At or about the time when the application was made, the first respondent gave one survey number. Later on, due to sub-division and in order to localise the site which was taken on lease by him for purposes of cinematographic exhibition, the site bore a different survey number in the sense that sub-division number ought to have been given to the parent number. That would not mean that the application suffers from a material defect which was not noticed by the appropriate authorities. As the learned Judge has pointed out, the localisation of the site was made on the basis of the lease of the land taken by the first respondent for purpose of exhibition. No doubt, this leased land formed part of the bigger survey number, and after sub-division, it bore a number different from the one given by the applicant in the first application. This was a matter which was exclusively for the authorities to consider and they having localised the site, no objection can be taken at this stage by a competitor in order to undo the grant made by the competent authorities under the Act and approved of by this Court at the stage when a *rule nisi* was asked for to quash the grant. The second objection also fails.

3. In the result, the writ appeal is dismissed.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

P. M. Kuppa Sah .. *Petitioner**

v.

Rajaram Sah .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *as amended by Act (XXIII of* 1973), *section* 10 (3) (c)—*Petition for eviction by landlord seeking additional accommodation — Physical occupation by landlord of concerned building, whether* sine qua non *for maintainability of application.*

The landlord, in the instant case, gave notice of termination of tenancy to all his three tenants. On receipt of the notice, one of the tenants vacated. As soon as the tenant vacated, the landlord put his own belongings in the portion and locked it up and kept it in his own possession and control. Finding that the other two tenants did not vacate, the landlord filed the present application under section 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, seeking additional accommodation.

Held: As jurisprudence contemplates juridical possession as the nearest equation of physical possession, in a case where the landlord keeps his things in a portion of the premises, vacated soon after he gave notice of termination of tenancy, and keeps it locked up under his control, and is in legal possession thereof, then, the intention of the landlord should be deemed to be to keep it in his physical possession, and this satisfies the requirements under section 10 (3) (*c*) of the Act. This is a case where the landlord filed the application under section 10 (3) (*c*). This is certainly maintainable because the landlord, though not in physical possession, was in legal occupation of the portion of the building.

[*Para.* 13.]

* C.R.P. No. 1244 of 1977. 10*th November*, 1978.

Cases referred to:—

Accommodation Controller v. *Rukmani Ammal,* (1971) 84 L.W. 90: A.I.R. 1971 Mad. 342; *Rajammal* v. *V. T. Swami,* (1967) 1 M.L.J. (S.N.) 46.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 praying the High Court to revise the decree of the Court of Small Causes (IV Judge), Madras dated 21st July, 1976 and passed in H.R.A. Nos. 294 and 295 of 1975 (H.R.C. Nos. 793 and 794 of 1973), Court of Small Causes (VIII Judge), Madras.

M. Srinivasan and *D. Desikan,* for Petitioner.

The Court delivered the following

JUDGMENT.—The petitioner in this civil revision petition is the landlord. He owns premises No. 1-A, Balakrishna Pillai New Street, Chintadripet, Madras-2. The respondent was one of the tenants occupying a portion of the premises on a monthly rent of Rs. 15. A notice of determination of tenancy was given by the petitioner against three of his tenants, who were by then occupying small portions in the premises. One of the tenants, on the issuance of the notice of determination of tenancy, vacated, and the petitioner put his belongings in that portion, locked it up and kept it with him. Thereafter he filed two petitions against the remaining two tenants, who did not comply with his request for surrender of possession as asked for in his notice of determination of tenancy. H.R.C. No. 793 of 1973 was against the tenant who was in occupation of a portion on a monthly rent of Rs. 30 and H.R.C. No. 794 of 1973 was against the present respondent. He filed the two petitions on the ground that both the tenants had committed wilful default in the payment of rents from November, 1972 to January, 1973. He also sought for the portions in the occupation of the two tenants for his own occupation by way of additional accommodation. This was obviously on the foot that he was in occupation of a portion of the building which one of the tenants had surrendered after the petitioner had issued the notice of determination of tenancy.

2. So far as the question of wilful default was concerned, it was denied by both the tenants. Their common case was that they did offer the rent, but, as the petitioner demanded enhanced rent, they refused to pay the same. They, however conceded that they did not give any reply to the notice of determination of tenancy issued by the petitioner. According to them, the petition was incompetent under section 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, as the petitioner was residing in a different building and therefore he was not entitled to additional accommodation. They would say that the petitioner could occupy the portions which had already fallen vacant in the premises and that, as the petitioner's family consisted of himself and his wife, the available vacant portion would be sufficient for him. They would also set out the disadvantages that might be caused to them in the event of their being asked to surrender possession, and contend that the inconveniences that they are likely to suffer would outweigh the advantage to be gained by the petitioner.

3. The Rent Controller found, on the question of wilful default, that the tenants did commit such wilful default and disbelieved the story of the tenants that there was a tender by them and that, because of the demand for enhanced rent, the landlord refused to receive the rents.

4. On the other point, whether the requirement of the premises by the petitioner by way of additional accommodation was *bona fide*, the Rent Controller found that the petition was maintainable in view of the admissions made by the tenants themselves that there is a portion which has fallen vacant in the premises, and which is in his possession and which would be sufficient for the occupation, of himself and the members of his family. He believed the landlord when he stated that he was occupying the portion which another tenant had vacated after he issued the notice of determination of tenancy, that he had kept his belongings there and that the other portions in the occupation of the other two tenants, including the respondent herein, by way of additional accommodation was *bona fide* required by him and that the tenants would not be inconvenienced. He further held that physical occupation by the petitioner of the portion which had fallen vacant was not necessary.

5. On the question whether the hardship that might be caused to the tenants would outweigh the advantage which the landlord may gain, the Rent Controller, after holding that the request of the petitioner was *bona fide*, went into the question and found that there would not be any such inconveniences to the tenants. After observing that it was not open to the tenants to dictate to the landlord as to what portion of his own building he requires for his own occupation, and after referring to the inconvenience felt by the landlord, who was rearing up his brother's children, as he was childless himself, the Rent Controller was of the view that the granting of the prayer for additional accommodation of the portion in the occupation of the tenants would not cause hardship to the tenants.

6. In this view of the matter the Rent Controller ordered eviction.

7. The Appellate Authority, while reversing the decision of the Rent Controller, held against the landlord. He accepted that the rents as claimed by the landlord was right, but would not find that there was wilful default in the payment of such rent. He accepted the contention of the landlord that there was no proof of tender of the agreed rent, but, in his view, as the tenants had paid the entire arrears of rent on the first date of hearing and as there was some discrepancy in the quantum of rent payable, because of the confusion created by the landlord himself, when he issued receipts for a lesser amount, a liberal view should be taken and accordingly he held that there was no wilful default. On the legal objection raised, that the petition as not maintainable under section 10 (3) (*c*) of the Act, the Appellate Authority held that, unless the landlord was in physical occupation of the premises, the petition under section 10 (3) (*c*) was not maintainable. It is as against this the present civil revision petition has been filed.

8. The Appellate Authority was of the view that under section 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control)

Act, 1960, physical occupation by the landlord is an essential *sine qua non* for the maintainability of the application. The landlord in this case gave a notice of termination of tenancy to all the three tenants. On the receipt of such a notice, one of the tenants vacated. This is not in dispute. As soon as the tenant vacated, the landlord put his own belongings in the portion and locked it up and kept it in his possession and control. Finding that the other two tenants did not vacate, he filed the present application under section 10 (3) (*c*) of the Act seeking for additional accommodation.

9. *Inter alia* both the tenants objected to the maintainability of the application under section 10 (3) (*c*) on the ground that the landlord was not in physical occupation of a portion of the building in question. It was in this context that the question arose whether the petition was maintainable without the landlord being in physical possession and occupation, though in corporeal possession of a part of the building, as already stated.

10. When the Legislature made a distinction between section 10 (3) (*a*)(i) and section 10 (3) (*c*), then the intendment of the Legislature in having made such a difference has to be found on a proper and meaningful understanding of the purpose for which such a legislative dichotomy has been created between the two sub-sections, sections 10 (3) (*a*) (i) and section 10 (3) (*c*). Whilst in the former case, the petitioner can seek for possession of the building owned by him and rented out to others on the ground that he requires it for the occupation of himself, his dependants and the members of his family, the latter provision contemplates that a landlord can ask for his own purposes additional accommodation, provided that he is in occupation of a portion of the building. The essential difference between the two has already been pointed out by this Court. Notwithstanding the fact that the Legislature amended section 10 (3) (*a*) (i) to fall in line with the judicial pronouncements of this Court, yet it did not think it necessary to improve upon or expand the intention and purpose contemplated in section 10 (3) (*c*). Under this sub-section the only requirement is that the landlord should be in occupation of a portion of the building and the additional accommodation sought for is needed *bona fide* by him. In so far as this sub-section is concerned, a subsidiary finding, but equally a necessary one, has to be rendered by Courts regarding such *bona fides* claimed by the landlord. This 'subsidiary *bona fides*', if such an expression can be used, touches upon the hardship which a tenant might suffer by reason of the order of eviction. If the hardship that is likely to be caused to the tenant outweighs the advantage which the landlord might obtain as a result of the same, then it is necessary for the Courts to render an additional finding on this aspect of hardship in favour of either the landlord or the tenant. These are the essential differences between section 10 (3) (*a*) (i) and section 10 (3) (*c*) of the Act.

11. In the light of this, the contention regarding the non-maintainability of the application has to be considered. It is admitted that the portion which the quandom tenant vacated, when notice of determination of tenancy was given, was occupied by the landlord, who put his belongings there and locked it up. The question is whether such a possession is sufficient under section 10 (3) (*c*) or physical occupation is a primary necessity. That possession is nine points of law is an ancient adage in jurisprudence. Possession may be physical possession or juridical possession. It is common ground that the landlord kept the premises vacant for one year and suffered loss of rent towards such portion of the building. He also took the ancillary precaution of keeping his belongings there and kept it locked up throughout.

12. In *Accommodation Controller* v. *Rukmani Ammal*[1], a Division Bench of this Court, approving of the view of Srinivasan, J., interpreted section 3 (10) (*c*) of the Act in a liberal fashion, and held that even "occupation for purposes of section 3 (10) (*c*) of the Act may well be occupation, where the owner resides in a portion of the house off and on and most of the time keeps it locked. The question is one of intention as disclosed by the act of user of the portion of the house. "Occupation may, no doubt, be physical, but it does not follow that the owner should

1. (1971) 84 L.W. 90 : A.I.R. 1971 Mad. 342.

actually reside in a portion of the house all the 24 hours in a day. It will be such occupation, if, intending to reside in the house, the owner keeps a portion therein locked, so that when the opportunity or necessity arises, the portion may be free for use by him or her". The Division Bench affirmed the judgment of Srinivasan, J. Srinivasan, J., had observed:

> "It may be that a person, who does not choose to reside permanently in one place may keep a part of his premises always available for his occupation and occupy it from time to time. That will be just as much occupation as occupation for all the time permanently by the owner. This provision is a new one, which did not find place in the old Act. If one can imagine the reasons which led to the introduction of this clause, it may well be that the Legislature intended that when the owner is himself in occupation of a part of the building, the choice of a tenant in respect of the part of the building should be left to him. Cases have not infrequently arisen under the old Act where the Accommodation Controller has thrust upon a landlord a tenant of a religious persuasion and practices different from that of the owner, who was also occupying the building. This undoubtedly led to considerable hardship on the part of the landlord and it is presumably to avoid such situations that a provision of this kind has been enacted."

The view of Alagiriswami, J., that the owner should be in physical occupation of the building was thus not approved by the Division Bench. This view of Alagiriswami, J., in *Rajammal* v. *V. T. Swami*[1], is therefore no longer good law.

13. We have already expatiated on the difference in the text of section 10 (3) (*a*) (i) and section 10 (3) (*c*) of the Act. As jurisprudence contemplates juridicial possession as the nearest equation of physical possession, I am of the view that, in a case where the landlord keeps his things in a portion of the premises, which was vacated after he gave notice of termination of tenancy, and keeps it locked up and under his control, and is in legal possession thereof, then it should be held that the intention of the landlord was to keep it in his physical possession, and this satisfies the requirements under section 10 (3) (*c*) of the Act.

14. There may be a case where the landlord, after giving notice of determination of tenancy, and, finding that only one among the three tenants has vacated, may out of necessity shift himself to that portion which has fallen vacant. In such a case the the request of the landlord to evict the tenants may also be considered under section 10 (3) (*c*). There is nothing in law which prohibits the invocation of section 10 (3) (*c*) in such circumstances. A debate, however, is possible in a case where the landlord has already initiated, proceedings for eviction of the tenants under section 10 (3) (*a*) after issuing a notice of determination of tenancy. He might have occupied a portion of the building physically after one of the tenants had vacated the portion after such a notice of determination of tenancy. Then the question would be whether the application originally filed under section 10 (3) (*a*) (*i*) may also be considered along with the application under section 10 (3) (*c*) subject, however, to the prescription under section 10 (3) (*c*) being satisfied. As subsequent events can also be taken into consideration without the same being ignored, for all purposes, it is possible for Courts to consider such a situation under section 10 (3) (*c*) of the Act also. No doubt, it has to be found whether the landlord requires the premises for his occupation, and whether the hardship that might be caused to the tenant would or would not outweigh the convenience of the landlord. This is a case where the landlord filed the application under section 10 (3) (*c*). This is certainly maintainable, because the landlord, though not in physical occupation, was in legal occupation of a portion of the building, I am therefore unable to agree with the conclusion of the Appellate Authority that the application was not maintainable.

15. The Rent Controller, though not expressly, but by necessary implication, has also found that the tenant would not be hard but, if he was asked to vacate the portion. What

1. (1967) 1 M.L.J. 46 (S.N.)

was urged, however, was that the landlord could have occupied the portions which had by then fallen vacant, instead of troubling the tenants. It is by now well-established by a series of decisions of this Court—which is not disputed either—that it is not for the tenant to dictate as to what portion the landlord should require for his own purpose. This aspect, however, weiged with the Appellate Authority. The landlord's case is that he has a family of his own, though he by himself has no children. He would say that his brother's children are being maintained by him, and that he requires the portion in the occupation of the tenant for himself. The Appellate Authority would say that the tenant, who was in occupation of the premises for several years, cannot find any alternative accommodation of a similar type anywhere else. He also felt that the portion which had fallen vacant would be sufficient to accommodate the petitioner and his family. It was in those circumstances that the Appellate Authority held that the hardship that was likely to to be caused to the tenants in the event of an order of eviction being passed against them would certainly outweigh the advantage that was likely to accrue in favour of the landlord. He therefore reversed the finding of the Rent Controller on this aspect also.

16. I am unable to agree, having regard to the view of this Court that it is not for the tenant to dictate as to what should be the requirement of the landlord. It is a decision entirely with the landlord, which a tenant cannot object to.

17. The other reason given by the Appellate Authority, that the tenant was in occupation for a number of years, and that he could not find an alternative accommodation of a similar type elsewhere, would amount to begging the question. The landlord in the instant case has explained his need and necessity. The Rent Controller has held that no hardship, as suggested, would be caused to the tenant. Merely because it will be difficult for the tenant to secure an alternative accommodation of a similar type, it cannot be said that the hardship that might be caused to him would outweigh the advantage to the landlord. This "subsidiary *bona fides*", contemplated under section 10 (3) (*c*) proviso should be viewed in a reasonable fashion. A *priori* consideration, such as the non-availability of similar accommodation, cannot be a guide, and the only guide, to come to the conclusion that the hardship would be more to the tenant. As the Appellate Authority has not given any reason to differ from the Rent Controller, who had found that such a hardship to the tenant would not outweigh the advantage to the landlord, the ultimate conclusion of the Appellate Authority is also not sustainable.

18. I am not inclined to disturb the finding of the Appellate Authority on the question of wilful default. No doubt there was some confusion because of the attitude of the landlord himself when he issued receipts for a lesser amount for a few months prior to the institution of the petition. In any event, as there is no apparent error or any other irregularity in the exercise of jurisdiction by the Appellate Authority, the contention of the landlord, that there was wilful default, has to fail.

19. The legal contention failing, and as the landlord has established that he requires the premises in the occupation of the respondent *bona fide* for his own purposes, and as he has also satisfied the other requirements as to "subsidiary *bona fides*", and, as in my view, the hardship to the tenant would not outweigh the advantage to the landlord, in the circumstances of the case, the civil revision petition is allowed, the order of the Appellate Authority is set aside, and an order of eviction is passed against the respondent-tenant, who shall deliver possession of the portion in his occupation within three months from this date. There will be no order as to costs. This Court records with appreciation the assistance rendered by Mrs. Gomathi, appointed *amicus curiae*.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Kuppa Pandithan .. *Petitioner**

v.

Marudhachala Pandithan and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (2) (i), *section* 10 (3) (a) (*i*)—*Petition for eviction—Wilful default—Owner's occupation — Subletting unauthorised — Eviction ordered both by Rent Controller and Appellate Authority — Revision by tenant—Tenant disputing title of landlord—Rent Controller's jurisdiction to decide dispute whether* bona fide — *Need not refer to civil Court in all cases.*

The landlord filed a petition for eviction on the grounds of wilful default in payment of rent being required for owner's occupation and unauthorised subletting by the tenant. The tenant contended that he had lent Rs. 3,100 to the landlord on the specific understanding that he could occupy the building till the debt was discharged and questioned the landlord's requirement of the building for his own occupation. The Rent Controller as well as the Appellate Authority ordered eviction. The tenant filed a revision. According to the tenant there was no relationship of landlord and tenant and the Rent Controller ought to have referred the matter to a civil Court.

Held: It is not as if in every case where the tenant merely alleged that he was not a tenant, the matter should end there and the Rent Controller had no jurisdiction to decide the question. Such an incidental question had to be decided by the Rent Controller before he passed an order of eviction against the tenant and, therefore, on such a question the parties could not be referred to a civil Court.

In this case, no document had been produced to prove that the lending was on condition of the petitioner being allowed to continue in the premises till the money was repaid by the landlord. Even assuming that the petitioner had lent the sum of Rs. 3,100 to the first respondent (landlord), still that would not stand in the way of the first respondent getting an order of eviction. [*Para.* 5.]

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973) praying the High Court to revise the Order of the Court of the Appellate Authority (Sub-Court), Udumalpet, dated 25th January, 1978 and made in R.C.A. No. 34 of 1977 (R.C.O.P. No. 15 of 1977 on the file of the Rent Controller), District Munsif, Udumalpet.

Pathy and *Sundaram*, for Petitioner.

The Court delivered the following

JUDGMENT.—The petitioner is the tenant against whom an eviction petition was filed by the first respondent claiming to be the landlord.

2. The grounds on which eviction was sought are threefold: (1) that the petitioner has wilfully defaulted in the payment of the rent due by him; (2) that the first respondent as owner requires the premises for his own occupation; and (3) that the petitioner has sublet the premises unauthorisedly to respondents 2 and 3 herein without the written consent of the landlord.

3. The eviction petition was resisted by the petitioner on various grounds. The petitioner's case is that there is no relationship of landlord and tenant between him and the first respondent in respect of the property in his occupation and, therefore, he is not liable to pay any rent for such occupation. He also contended that he has lent a substantial sum of Rs. 3,100 to the first respondent on the specific understanding that he will be allowed to occupy the building till the said debt is discharged, and, therefore, there is no question of his paying any rent to the first respondent. He also denied that the first respondent requires the premises *bona fide* for his own occupation. As regards the question of subletting also, the petitioner denied the factum of subletting.

4. The Rent Controller as well as the Appellate Authority have however upheld the case

*C.R.P. No. 3358 of 1978. *1st February*, 1979.

of the first respondent and held that the three grounds of eviction put forward by him had been established. In that view, the eviction order has been passed against the petitioner.

5. The petitioner now contends before this Court that when the tenant specifically pleads that there is no relationship of landlord and tenant, the Rent Controller has no jurisdiction to decide that question and the matter should have been referred to the civil Court. The provisions of the Rent Control Act provide that whenever there is a *bona fide* dispute as to title, the parties have to be referred to a civil Court and the Rent Controller cannot decide the dispute as to title to the property. But in this case, the dispute is as regards the relationship of landlord and tenant between the petitioner and the first respondent and such a dispute can be decided only by the Rent Controller. That is an incidental question to be decided by the Rent Controller while deciding the question as to whether the grounds for eviction had been established. It is not as if in every case where the tenant merely alleges that he is not a tenant, the matter should end there and the Rent Controller has no jurisdiction to decide the question. I am of the view that such an incidental question has to be decided by the Rent Controller before he passes an order of eviction against the tenant and, therefore, on such a question the parties cannot be referred to a civil Court. The other contention by the learned counsel for the petitioner is that so long as the amount lent by him to the landlord is outstanding, he cannot be evicted from the premises as the understanding at the time of the lending was that he will be allowed to continue till the amount is repaid. But in this case, no document has been produced to prove that the lending was on condition of the petitioner being allowed to continue in the premises till the money is repaid by the landlord. Even assuming that the petitioner has lent the sum of Rs. 3,100 to the first respondent as alleged, still that will not stand in the way of the first respondent getting an order of eviction. If really the petitioner had lent a sum of Rs. 3,100 as alleged by him it is open to him to recover the same by taking appropriate Court proceedings. But that is not a ground for refusing an order of eviction especially when there is no evidence worth acceptance to the effect that the petitioner lent the said sum to the first respondent on condition that he should be allowed to continue in the premises till the amount is returned. In this view of the matter, I see no reason to interfere with the findings rendered by the authorities below.

6. The revision petition is, therefore, dismissed.

7. The petitioner is, however, granted three months' time from this date for vacating on condition of his depositing with the Rent Controller or paying directly to the first respondent of sum of Rs. 150 representing three months' rent within two weeks from this date.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

P. V. Subbu Chetty and Sons .. *Petitioner**

v.

M/s. Madras Stainless Emporium (Regd.) and another .. *Respondets.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *as amended by Act (XXIII of* 1973), *setions* 10 (2) (ii) (*a*) *and* 10 (2) (iv)—*Partnership consisting of mother and sons carrying on business in the premises—Dissolution of partnership — One partner continuing to stay in the premises and carrying on business under a different name—Payment of rent by the new firm — Petition for eviction by landlord on the ground of sub-letting and wilful default, if lies.*

Under section 10 (2) (*ii*) (a) of the Tamil Nadu Buildings (Lease and Rent Control) Act a landlord is entitled to an order for eviction if there is a sub-letting of the building or any portion thereof without his written

* C.R.P. No. 2743 of 1977. 11*th January*, 1979.

consent. Section 10 (2) (*vi*), on the other hand, speaks of a situation where the tenant has ceased to occupy a building for a continuous period of four months without reasonable cause. If the case of sub-letting of a part of the building is proved, then it would also pragmatically mean that the tenant has ceased to occupy that portion of the building for a continuous period of four months without reasonable cause. In this sense, where there is a partial letting out of a portion of a building and that is made out as a ground for eviction under section 10 (2) (*ii*) (a), then, it could also be viewed as if there has been a cessation of occupation of the building by the main tenant for over a period of four months if such sub-letting continues for that period without reasonable cause. But if it is a case where the entire building is sub-let without authority, then obviously it follows that the tenant has ceased to occupy the building and section 10 (2) (*vi*) would come into play, only if the cessation in relation to such non-occupancy could be for well over a period of four months. This is only one factor which distinguishes the purpose and meaning of the reliefs contemplated under section 10 (2) (*ii*) (a) and section 10 (2) (*vi*). In that sense, therefore, it has to be considered whether in the instant case there has been sub-letting and if such sub-letting continued for a period of well over four months, then the landlord can claim eviction both under sections 10 (2) (*ii*) (a) and 10 (2) (*vi*) of the Act. Even so, if it is a partial sub-letting and if it continues for more than four months the same result follows. [*Para.* 5.]

Held, that relief asked for by the landlord on the ground that there had been such cessation of occupation was not available to the landlord in the circumstances of the case. On the question of wilful default the finding of the Appellate Authority was not satisfactory and hence, the matter was remitted to the Appellate Authority to find out whether there was wilful default or not in the payment of rent.

Petition under section 25 of Tamil Nadu Act (XVIII of 1960) as amended by Act praying the High Court to revise the decree of the Court of Small Causes (III Judge), Madras Appellate Authority, dated 25th April, 1977 and passed in H.R.A. No. 113 of 1976 (H.R.C. No. 2694 of 1972, Court of Small Causes (VIII Judge), Madras.

K. P. Unnikrishnan, for Petitioner.

The Court delivered the following

JUDGMENT:—On three grounds the petitioner filed a rent control petition for evicting the respondent from premises No. 91/1, Venkatachala Mudali Street, Mylapore, Madras-4. The undisputed facts in this case are that originally a partnership consisting of mother and her three sons were carrying on business in the premises in question under the name and style of Messrs. Stainless Steel Emporium. The petitioner later found the sign board of M/s. Ameena Metal Stores in the said premises and, therefore, he was of the view that the original emporium vacated the premises or it has sub-let the same to Ameena Stores. With that impression gained by him on the facts discovered at site and also on the ground that the tenant, meaning thereby the Emporium, did not send rents from June to September, 1972, the present application for eviction was filed.

2. The first respondent's case was that the partnership was dissolved in 1970, that one of the partners of the quondam partnership continued to remain in the premises and was trading therein but under a different style of Ameena Stores and that, therefore, there was neither sub-letting nor a question of the tenant ceasing to occupy the premises can ever be thought of or has arisen in this case. In so far as the non-payment of rent for June to September, 1972 was concerned, the respondent's case was that the tenant in the sense the second respondent tendered the rent and notwithstanding the fact that the landlord was not put on notice of the dissolution of the original firm in writing and notwithstanding the absence of notice of specific induction of the second respondent as tenant, the rent, which was tendered by drafts was being so tendered or paid by the second respondent, Ameena Stores and it would not make any difference. The respondents, therefore, resisted the application for eviction on the above grounds.

3. The Rent Controller found that the petitioner as landlord was entitled to an order for eviction on all the grounds. The appel-

late authority reversed the judgment again on all the grounds. Hence, the civil revision petition.

4. Mr. Unnikrishnan, learned counsel for the petitioner, repeats the contentions raised before the authorities and would say that there has been sub-letting and that the petitioner has made out a case that the tenant has ceased to occupy the building for a period of more than four months as contemplated under section 10 (2) (*vi*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. He would also contend that by reason of Ameena Stores being inducted into the premises by the quondam partnership firm there has been sub-letting without authority within the meaning of section 10 (2) (*ii*) (*a*) of the Act. He would further contend that the appellate authority, while reversing the finding of the Rent Controller, did not give a specific ruling as to whether there has been indifference or wanton failure on the part of the tenant in tendering the rents and in any event the tender of such rents by drafts by the second respondent without disclosing his identity is by itself a suspicious circumstance and such tender of rent ought to be ignored and the petitioner given relief under section 10 (2) (*i*).

5. The question is whether there is identity either in part of in whole in the cause of action when it is laid under section 10 (2) (*ii*) (*a*) and 10 (2) (*vi*) of the Act. Under section 10 (2) (*ii*) (*a*) a landlord is entitled to an order for eviction if there is a sub-letting of the building or any portion thereof without his written consent. Section 10 (2) (*vi*) on the other hand, speaks of a situation where the tenant has ceased to occupy a building for a continuous period of four months without reasonable cause. If the case of sub-letting of a part of the building is proved, then it would also pragmatically mean that the tenant has ceased to occupy that portion of the building for a continuous period of four months without reasonable cause. In this sense, where there is a partial letting out of a portion of a building and that is made out as a ground for eviction under section 10 (2) (*ii*) (*a*) then, it could also be viewed as if there has been a cessation of occupation of the building by the main tenant for over a period of four months if such sub-letting continues for that period without reasonable cause. But if it is a case where the entire building is sub-let without authority, then obviously it follows that the tenant has ceased to occupy the building and section 10 (2) (*vi*) would come into play, only if the cessation in relation to such non-occupancy could be for well over a period of four months. This is only one factor which distinguishes the purpose and meaning of the reliefs contemplated under section 10 (2) (*ii*) (*a*) and section 10 (2) (*vi*). In that sense, therefore, it has to be considered whether in the instant case there has been sub-letting and if such sub-letting continued for a period for well over four months, then the landlord can claim eviction both under sections 10 (2) (*ii*) (*a*) and 10 (2) (*vi*) of the Act. Even so if it is a partial sub-letting and if it continues for more than four months the same result follows. Therefore, it is necessary to consider in the instant case whether the continuation of the business by one of the partners of the quondam dissolved firm would mean sub-letting by the erstwhile firm to the second respondent or whether relief could be granted to the landlord under section 10 (2) (*vi*) of the Act. It would have been necessary for me to go into the question in rather detail but for the decision of the Supreme Court rendered in *Murli Dhar* v. *Chuni Lal and others*[1]. That was a case where the original tenant was a partnership firm. That business was closed and thereafter a shop was used by a new firm, of which one of the partners was a partner of the quondam firm. The question arose whether it could be said, in the circumstances, that the original partnership, firm, which was the tenant in question, could be deemed to have sub-let the premises to the new firm in which one of the partners was common. In that connection, the Supreme Court said that the firm name is only a compendious way of describing the partners of the firm, and, therefore, occupation by a firm is only occupation by its partners, that where the old and new firms have a common partner, the occupation will be by one of the original tenants and that the common partner will be considered to be in possession all through in his individual capacity and it is

1. 1970 All India Rent Control Journal 922.

impossible to treat him as possessing one legal personality as member of another firm. It, therefore, negatived the contention of the landlord that there was sub-letting in those circumstances. Applying this decision, it should be held that the occupation of the premises by Ameena Metal Stores, in which one of the partners was admittedly a partner of Madras Stainless Steel Emporium, cannot be said to be as a result of sub-letting by the quondam dissolved firm and, therefore, the appellate authority was right in having negatived the relief on that ground. I have already prefaced by saying that the relief of sub-letting could overlap with the relief contemplated under section 10 (2) (*vi*) of the Act which deals with cessation of occupation of the tenant for a period of four months and over. Having regard to the decision of the Supreme Court as above (the relief asked for by the landlord on the ground that there has been such cessation of occupation is not available to the landlord in the circumstances of the case).

6. As regards the plea for eviction on the ground of wilful default, I am not satisfied that the appellate authority has rendered a finding which is required of him to do so in such circumstances. This is a case in which the second respondent kept his identity at the background and did not want to reveal either the dissolution of the firm in 1970 or the claim, that he was continuing in occupation of the premises as a partner in the quondam firm. He, however, sent certain drafts in his own name without reference to the quondam tenant who was the original tenant and without even candidly making it clear that he was sending it in the individual capacity as an occupant of the premises. Whether, in such circumstances, the consistent attitude and conduct of the second respondent by having sent rents in his own name, would amount to a valid tender, and if it is not, whether it would still amount to wilful default meaning thereby that the second respondent was supinely indifferent in the matter of sending rents without even disclosing his identity and without referring to the landlord that he was continuing in occupation as the past partner of the original tenant, are the questions to be considered. These questions were not considered in that light by the appellate authority but he would assume that as drafts were sent, it cannot be deemed that such tender should be completely ignored, and the grant of relief on the ground that there was wilful default in the payment of rent cannot be contemplated. Whilst, therefore, disagreeing with the appellate authority on the question whether there has been wilful default or not in the payment of rent by the second respondent, who refused to disclose his identity, I remit the subject-matter to the appellate authority for a reconsideration on the evidence on record and to find whether the tenant did not pay or tender the rents due by him in respect of the building, as contemplated under the Act, and whether the payments made by drafts without the second respondent disclosing his identity would amount to a valid tender at all and whether in consequence there has been wilful default in the payment of rents for the months in question. The findings on the first two grounds as found by the appellate authority are confirmed. The subject-matter is remitted as hereinbefore stated for the consideration of the appellate authority. No costs.

R.S. ——— *Case remitted.*

[END OF VOLUME (1979) 1 M. L. J. (REPORTS)].